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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1935.

Nos. 403-404.

GEORGE ASHWANDER et al.,
Petitioners,
vs.
TENNESSEE VALLEY AUTHORITY et al.,
Respondents.

BRIEF FOR PETITIONERS.

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INDEX AND SUMMARY OF THE ARGUMENT.

Page

Opinions below xviii

Jurisdiction xviii

Foreword 1

STATEMENT OF THE CASE 3

1. The suit and controversy 3

2. The TVA electricity program is part of a national power policy 6

3. Overt acts in executing the electrification program of the administration of which the Tennessee Valley Authority is a part 11

   No-recourse loans and investments 19

4. The Tennessee Valley Authority program 21

   (a) Dominant objectives 21
   (b) Territorial scope of TVA electric network 24
   (c) Commercial utility characteristics of the TVA program 27
   (d) The integration of all TVA sources of power 30
   (e) The amount of electric power available to the TVA program 32
   (f) The installment sale promotional agency established at request of TVA 32
   (g) The facts proven show that the proposed operations by TVA would constitute a monopoly in the area selected for operation, would displace and defeat the jurisdiction of the state to regulate local utilities and directly burden the discharge by public utilities of their duty to provide for extensions and increase of facilities 34

5. Principal overt acts in furtherance of TVA integral program 38
    - (a) The announced program as a whole, and its direct threat of competition with the power company 38
    - (b) The contract of January 4, 1934 (transmission and rural and urban distribution systems) 39
    - (c) Compulsion and abuse of power........ 41
    - (d) The option agreement of August 9, 1934 (seventeen urban distribution systems)........ 42
    - (e) Investment and participation in competitive electric systems by the Government under Government control 44
    - (f) The relationship of the Government to municipal electric systems being financed by it in Alabama 44
        - Situation confronting plaintiffs and their corporation at time of the final decree........ 47
    - (g) The various types and sources of power in the TVA commercial electric business........ 49
        - 1. Inland steam or Diesel plants purchased by TVA 51
        - 2. Electric power purchased by TVA for resale 53
        - 3. Steam plant No. 2 at Muscle Shoals........ 53
        - 4. The commercial hydro-electric generators in navigation or other dams........ 55

6. Facts as to the absence of any factual relation between TVA commercial program and any constitutional function 56
    - (a) Facts as to lack of relation to regulation of navigation 57
        - 1. Utilization of waters to create electricity is not coincident or identical with manipulation of waters in regulation of navigation 58
    - (b) Facts as to lack of relation to "disposal" of federal property 62

(c) 1. Facts as to claim of Government (TVA) to proprietary right to appropriate, as federal property, the waters of the Tennessee River admittedly not necessary to be manipulated in the regulation of navigation.. 63

2. Facts as to the distinction and inconsistency between "disposal" of property and permanent operation in manufacture of power as basis for a commercial utility system...... 64

(d) Facts as to commercial utility program of TVA being in derogation of the sovereignty of the United States and of the legislative power and duty of Congress................. 65

(e) Facts as to the effect of the TVA program as an interference with state regulation of utilities 66

The bill of complaint and the findings of fact...... 68

The controversy as presented by the stockholder's suit 69

The final decree of March 2, 1935................. 71

The appeals (Nos. 403-404)........................ 72

SPECIFICATION OF ERRORS........ 74

SUMMARY OF ARGUMENT......... 74

ARGUMENT................ 75

I.

General principles applicable to this case............ 75

A. Powers not expressly granted to the Federal Government cannot be implied or regarded as incidental where their exercise would be inconsistent with affirmative powers granted by the Constitution or with its letter and spirit.......................... 75

B. Commitment of the Government by fixed contracts to the permanent business of commercial manufacture of electricity and rendition of regional utility service within state domain is intrinsically alien to federal function 83

C. The desire for revenue does not authorize the Federal Government to commit itself to engage in a permanent commercial business to earn it 93

D. The property clause of the Constitution (Art. IV, Sec. 3, Cl. 2) does not authorize permanent operation of a commercial business by the Federal Government 97

The genesis of the property clause and, notably, the rejection of a general welfare amendment by the convention, make clear that region-wide commercial operations in state domain were not contemplated 98

Analysis of the elements of property involved and the threatened acts of "disposal" indicates plainly the non-federal objectives and means employed 102

The conduct of a permanent business is not a function of disposal 106

The conduct of a permanent utility business is not a function of conservation of Government property 110

Possible war uses for a product do not justify its commercial manufacture and sale by the Federal Government 112

Orderly and bona fide liquidation of war investments is clearly distinguishable 115

There is a fundamental distinction between ownership or leasing of property and doing business 117

E. The commerce clause does not authorize the Federal Government to engage in a commercial business 118

Protection of commerce of the states from interferences within the nation was a basic motive underlying the draft of the Constitution............... 120

F. The contentions of TVA and the basis of the decision announced by the Circuit Court of Appeals cannot be reconciled with the decisions of this Court as to the rights of the State and its grantees in the waters of navigable streams.............. 129

Wisconsin v. Illinois...................... 132

The Green Bay ("Surplus Water") cases....... 134

The extraordinary contention and program of the TVA cannot be sustained under the Green Bay cases 142

G. There is a clear distortion of function in the effort of TVA to superimpose a claim of power as to incidental non-federal activities on the regulation of navigation 144

H. Active participation by the Government in the control of the proposed defendant municipal systems and its proven objectives in financing the systems renders the proposed investments illegal, without reference to their intrinsic invalidity as appropriations for non-federal purposes.................. 147

1. The Federal Government cannot make appropriations and investments for purposes which are beyond its power of affirmative action..... 148

Express rejection of the general welfare clause as a power....................... 154

2. It cannot be contended that the general welfare provision in the tax clause is a grant of power of affirmative action as to nondelegated functions 155

The proposed federal investments involved in this case are invalid..................... 157

II.

Where the dominant objective of an act of Congress or an administrative program undertaken by the Federal Government is to regulate or control matters reserved by the Ninth and Tenth Amendments, the act or transaction is illegal.......................... 159

III.

The TVA commercial electric program in its entirety is in violation of the Constitution.................. 164

A. The Tennessee Valley Authority program is inconsistent with the theory and function of the Federal Government 165

B. Power to impose a permanent servitude upon the Government cannot be implied or sustained....... 168

C. A contract by a federal agency which would barter away or burden a power or a function mandated to the Federal Government is void................. 170

D. The TVA program is inconsistent with the Tenth Amendment 172

The Tennessee Valley Authority program deprives the states of traditional revenues........ 173

E. The program is inconsistent with the Constitution in its region-wide displacement of utility regulation within the states by an anomalous and arbitrary federal monopoly of utility service.......... 175

F. The TVA program is not "necessary and proper" or reasonably related to the execution of any power of the Government under the Constitution........ 179

IV.

The specific acts and transactions of Tennessee Valley Authority complained of on this record are severally and as parts of an integral power program violative of the Federal Constitution............................ 185

Interconnection of power units..................... 185

Restricted application of the program would not validate it 186

Systematic effort by TVA to understate the facts... 188

Schedule of principal specific acts and transactions 189

(1) Commercial operation of steam-electric plant at Muscle Shoals 189

(2) Inland commercial steam-electric plants..... 191

(3) Commercial hydro-electric plants........... 192

(4) The region-wide competitive utility operation of TVA is illegal.......................... 195

(5) Investment in utility systems............... 197

(6) The contract of January 4, 1934............ 197

(7) The principal methods of sale employed by TVA in its program are alike illegal: commercial transmission and distribution............ 198

(8) The methods in detail for advancing the general objectives are illegal.................... 199

V.

The Government corporations, asserted administrative precedents, and reclamation projects relied upon by TVA are not only not supporting precedents, but constitute impressive recognition that the asserted power does not exist.............................. 202

There is a vital distinction between the commercial powers, including competitive functions, which may be granted to a private business corporation created or adopted as a federal agency, and exercise of such powers by the Government...................... 206

So-called precedents where no remedy existed are not judicial precedents........................... 207

Emergency fleet corporation.................... 208

Post office 209

War finance 210

Barge lines 210

The Pacific railroads 211

The so-called precedent of reclamation projects.... 213

VI.

The action of TVA in furtherance of its program is characterized by arbitrary administration of the power and resources of the Government and constitutes illegal action and competition...................... 216

VII.

The Tennessee Valley Authority Act of 1933, as amended, is unconstitutional because of the delegation of legislative power.............................. 221

VIII.

This stockholders' suit was properly entertained by the District Court and by the Circuit Court of Appeals 224

The threat of estoppel and the emergency.......... 225

Contracts of January 4 and August 9, 1934........ 226
All parties are before the Court on a full record.... 228
The Alabama Power Company could have maintained the suit.................................... 231
CONCLUSION.................. 235
Maps A, B and C..............................opp. 238

Cases Cited.

Adair v. U. S., 208 U. S. 161, 180..................... 80
American Bank and Trust Co. v. Federal Reserve Bank, 256 U. S. 350.......144, 158, 159, 184, 201, 219, 220
Arizona v. California, 283 U. S. 423..............130, 131
Arkadelphia Milling Co. v. St. Louis Southwestern Ry. Co., 249 U. S. 134...............................114, 198
Ashwander v. Tennessee Valley Authority, 8 Fed. Supp. 893, 9 Fed. Supp. 965........................ 84
Bailey v. Drexel Furniture Co., 259 U. S. 20 ....77, 84, 142, 161, 164
Belknap v. Schild, 161 U. S. 10, 16.................. 167
Brown v. U. S., 263 U. S. 78-83...................144, 193
Brushaber v. Union Pacific Ry. Co., 240 U. S. 1....... 227
Burley v. United States, 179 Fed. 1.................. 214
Central Pacific Railroad Case, 127 U. S. 1............ 211
Central Transportation Co. v. Pullman Co., 139 U. S. 24 227
Chastleton Corp. v. Sinclair, 264 U. S. 543 (1924).... 161
Chicago v. Mills, 204 U. S. 321...................... 227
Child Labor Tax Case, 259 U. S. 20.........77, 84, 142, 161
City of Campbell v. Arkansas-Missouri Power Co. (C. C. A. 8th, 1932), 55 F. (2d) 560.................. 233
Clallam County v. United States Spruce Corp., 263 U. S. 341...................................85, 115, 212
Cole v. La Grange, 113 U. S. 1, 9.................... 151
Collector v. Day, 11 Wall. 113, 124.................. 80
Colonial Trust Co. v. Montevallo Brick Co., 172 Fed. 310 158
Colorado Cent. Power Co. v. Municipal Power Development Co. (Dist. Ct. Colorado, 1932), 1 F. Supp. 951 233
Corporation Commission of Oklahoma v. Lowe, 281 U. S. 431 (1930)................................ 233

Cotting v. Goddard, 183 U. S. 79 227
D. & H. Co. v. Albany etc. Co., 213 U. S. 435 227
Denver v. Denver Union Water Co., 246 U. S. 178 232
Denver Tramway Corp. v. Peoples Cab Co. of Denver, Inc. (Dist. Ct. Colorado, 1932), 1 F. Supp. 449. 233
Detroit International Bridge Co. v. Appeal Board, 294 U. S. 83 .... 118, 211
Dodge v. Mission Township, 107 Fed. 821 151
Dodge v. Woolsey, 18 How. (59 U. S.) 331 227
Dorr v. U. S., 195 U. S. 140 149
Downs v. Bidwell, 182 U. S. 244, at pp. 290, 291 90
Dred Scott v. Sandford, 19 How. 393 .... 89, 98, 100, 101
Duke Power Co. v. Greenwood County, 10 Fed. Supp. 854 233
East Ohio Gas Co. v. Tax Commission, 283 U. S. 465 .. 92
Edwards v. Chile Copper Company, 270 U. S. 452 158
Employers Liability Cases, 207 U. S. 463 (1908) 84
Ex Parte Heinekamp Motor Co. v. The Ford Motor Co., 24 Fed. (2nd) 861 158
Ex Parte Jackson, 96 U. S. 727 237
Ex Parte Young, 209 U. S. 123 227
Fairbank v. U. S., 181 U. S. 283, 306-311 208
Federal Land Bank v. Gaines (1933), 290 U. S. 247 .. 207
Federal Land Bank v. Priddy (1935), 79 L. ed. Adv. Ops. 709 207
Federal Trade Comm. v. Algoma Lbr. Co., 291 U. S. 67 . 234
Federal Trade Comm. v. Royal Milling Co., 288 U. S. 212 234
Federal Trade Comm. v. Winsted Hosiery Co., 258 U. S. 483 234
Field v. Clark, 143 U. S. 649, 691 208
First National Bank v. Fellows ex rel. Union Trust Co. (1917), 244 U. S. 416 207
Flint v. Stone Tracy Co., 220 U. S. 107 118
Fox v. Cincinnati, 104 U. S. 783 .... 135, 168
Frost v. Corporation Commission, 278 U. S. 515 233
Frothingham v. Mellon, 262 U. S. 447 231
Gallardo v. Porto Rico Ry. & Light & Power Co. (C. C. A. 1st, 1927), 18 F. (2d) 918 233
Green Bay Canal Co. v. Patten Paper Co., 172 U. S. 58, on rehearing 173 U. S. 179 .... 134, 140, 141, 144
Green v. Frazier, 253 U. S. 233 .... 107, 135, 151
Greenwood v. Un. Fr. R. Co., 15 Otto (105 U. S.) 13 .. 227

Gibbons v. Ogden, 9 Wheat., at 199................. 148
Hammer v. Dagenhart, 247 U. S. 251.......77, 84, 125, 161
Hawes v. Oakland, 104 U. S. 450........................ 230
Helvering v. Powers, 293 U. S. 214...........107, 120, 128
Henderson Bridge Co. v. Kentucky, 166 U. S. 150..... 118
Highlands v. Russell Mfg. Co., 279 U. S. 253........ 112
Hill v. Wallace, 259 U. S. 44.................84, 161, 227
Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229.. 233
Indian Motorcycle Co. v. U. S., 283 U. S. 570......... 80
International Paper Co. v. United States, 282 U. S. 399 ....84, 116, 142, 160
In re Corbin's Will, 91 N. Y. S. 797............... 108
Jackson v. Jackson (Miss.), 107 So. 255............. 82
Jacobson v. Massachusetts, 197 U. S. 11............86, 149
Jones v. Portland, 245 U. S. 217..............107, 135, 143
Kansas v. Colorado, 206 U. S. 46 ....77, 84, 88, 97, 98, 103, 130, 134, 214
Kansas Gas and Electric Co. v. City of Independence, November 7, 1935 (C. C. A. 8th)................. 156
Kaukauna Water Co. v. Green Bay Canal Co., 142 U. S. 254...........134, 136, 137, 138, 139, 144, 146, 194
Keller v. United States, 213 U. S. 138, 148........... 80
Kidd v. Pearson, 128 U. S. 1, 24......................84, 91
Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 164.. 81
L. & N. Ry. v. Mottley, 219 U. S. 467.............82, 170
License Tax Cases, 5 Wall. 462.......................84, 91
Linder v. United States, 268 U. S. 5, 17.....77, 84, 125, 161
Loan Association v. Topeka, 87 U. S. (20 Wall.) 655.. 151
Lowell v. Boston, 111 Mass. 454..................... 151
Lucas v. Extension Oil Co. (C. C. A. 5), 47 Fed. (2d) 65 118
Luxton v. North River Bridge Co., 153 U. S. 525..... 211
Magruder v. Drury, 235 U. S. 196................... 172
Magnano Co. v. Hamilton, 292 U. S. 40 (1934)....... 161
Marbury v. Madison, 1 Cranch. 137, 2 L. Ed. 60...... 231
Marsh v. Whitmore, 88 U. S. 178.................... 172
Massachusetts v. Mellon, 262 U. S. 447...........149, 207
Maynard v. Hill, 125 U. S. 190, 204................ 208
McCready v. U. S., 94 U. S. 391..................105, 187
McCoach v. Minehill & S. Ry. Co., 228 U. S. 295..... 118
McCulloch v. Maryland, 4 Wheat. 316 ....75, 76, 77, 154, 161, 177, 204
McCutcheon v. Merz Capsule Co., 71 Fed. 787, 796.... 225

Miles Planting Co. v. Carlisle, 5 Appeal Cases District of Columbia 138, 161 208

Missouri v. Duncan (1924), 265 U. S. 17 207

Missouri v. Holland, 252 U. S. 416 .... 91, 127

Missouri Public Serv. Co. v. City of Concordia, Mo. (Dist. Ct. Mo., 1934), 8 F. Supp. 1 233

Mobile Transportation Co. v. City of Mobile, 153 Ala. 409 132

Monongahela Bridge Co. v. United States, 216 U. S. 177, 195 .... 201, 232

Monongahela Nav. Co. v. United States, 148 U. S. 312 .... 80, 125, 134, 144, 146, 200, 201

Myers v. U. S., 272 U. S. 52, 170-171 (1926) 207

New State Ice Co. v. Liebman, 285 U. S. 261 233

Norman v. B. & O. Ry., 294 U. S. 240 .... 82, 170, 234

Ohio v. Helvering, 292 U. S. 360 .... 107, 120, 128

Osborne v. Bank, 9 Wheat. (22 U. S.) 738, 860 (1824) 128, 207

Opinions of Justices, 226 Ala. 570, 148 So. 111 .... 46, 152

Panama Refining Co. v. Ryan, 293 U. S. 338 .... 82, 125, 171, 178, 208, 221

Parkersburg v. Brown, 106 U. S. 487 151

Pearce v. Pearce, 199 Ala. 491, 74 So. 952 108

Pennsylvania Coal Co. v. Mahon, 260 U. S. 393, at p. 414 .... 84, 229

People v. Brown, 203 N. Y. 136, 142 82

Pierce v. Society of Sisters, 268 U. S. 510 233

Pollard v. Hagan, 3 How. 212, 223 .. 98, 114, 129, 131, 144, 174

Pollock v. Farmers Loan & Trust Co., 157 U. S. 420 (158 U. S. 601) 161, 227

Port of Seattle v. Oregon-Washington Ry., 255 U. S. 56 130

Public Utility Commission v. Attleboro Steam and Electric Co., 273 U. S. 83 92

Public Utilities Comm. v. Landon, 249 U. S. 236 92

Puget Sound L. & P. Co. v. Seattle, 291 U. S. 619 .... 107, 135

Railroad Retirement Board v. Alton Ry., 79 L. ed. Adv. 803, 55 Sup. Ct. 758 .... 91, 175

Rifling v. Burnet (C. C. A. 8th), 47 Fed. (2d) 859 108

Robertson v. Chapman, 152 U. S. 673 172

Schechter v. United States, 55 Sup. Ct. 837, 79 L. Ed. 888, 97 A. L. R. 947 .... 77, 82, 91, 125, 171, 221

Shively v. Bowlby, 152 U. S. 1, 43 130

Skinner & Eddy Corporation v. McCarl, 275 U. S. 1.. 206
Smith v. Kansas City Title & Tr. Co. (1921), 255 U. S. 180 ....207, 227
Smith v. Turner, 7 How. 283, 428.................. 90
South Carolina Power Co. v. Tax Commission, 52 F. (2d) 515, 524; Affirmed 286 U. S. 525............92, 119
Smyth v. Ames, 169 U. S. 466......................... 227
South Carolina v. United States, 199 U. S. 437, 457 ....83, 88, 107, 120, 128
Tennessee Public Service Co. v. City of Knoxville (Appendix, p. 124).............................84, 217
Texas & N. O. R. Co. v. Brotherhood of Ry. & S. S. Clerks, 281 U. S. 548............................. 231
The Siren, 7 Wall. 152...............................149, 167
Trusler v. Crooks, 269 U. S. 475....................84, 161
Twin Falls Canal Co. v. Foote, 192 Fed. 583.......... 214
Union Pacific Ry. v. Pub. Serv. Comm. of Mo., 248 U. S. 67.................................... 228
U. S. v. C. M. & St. P. Ry., 282 U. S. 311, 327........ 80
U. S. v. Cohen Grocery Co., 255 U. S. 81, 88.......... 80
U. S. v. Emery B. & T. Realty Co., 237 U. S. 28...... 118
U. S. v. Gratiot, 14 Pet. 526...........94, 108, 109, 185, 187
U. S. v. Joint Traffic Association, 171 U. S. 505, 571-572 ....80, 125
U. S. v. McCullagh, 221 Fed. 288..................127, 128
U. S. v. Shauver, 214 Fed. 154....................... 128
U. S. v. Trinidad Coal Co., 137 U. S. 160, 170....... 107
United States v. Arizona, 55 Sup. Ct. 666, 79 L. Ed. 681 ....93, 130
United States v. Boyer, 85 Fed. 425................. 208
United States v. Chandler-Dunbar Water Power Company, 229 U. S. 53 ....132, 133
United States v. Dewitt, 9 Wall. 41................. 98
United States v. One Ford Coupe, 272 U. S. 32...... 161
United States Shipping Board Emergency Fleet Corporation v. Western Union, 275 U. S. 415...206, 208, 209
United States v. Southern Pacific (D. C. Ariz. 1928), 29 Fed. (2d) 433.................................. 237
United States v. West Virginia, 79 L. ed. 848........ 130
Utah Power and Light Co. v. Pfost, 286 U. S. 165 ....92, 103, 113, 119, 125, 198
Veazie Bank v. Fenno, 8 Wall. 533.................78, 161
Van Brocklin v. Anderson, 117 U. S. 157, 158........ 107

Von Baumbach v. Sargent Land Co., 242 U. S. 503..118, 157
Wardell v. Union Pacific R. R., 193 U. S. 51.......... 172
Washington Water Power Co. v. City of Coeur d'Alene, 9 F. Supp. 263.......................... 233
Wilson v. Shaw, 204 U. S. 24........................ 229
Williams v. Wells Fargo & Co. Express, 177 Fed. 352.. 237
Wisconsin v. Illinois, 278 U. S. 367 ......78, 126, 128, 132, 133, 134, 141, 142, 161, 162, 196
Wolf v. Smith, 149 Ala. 457, 42 So. 824............. 231
Wormley v. Wormley, 8 Wheat. 421, 441............. 172
Zonne v. Minneapolis Syndicate, 220 U. S. 187.....118, 157

Statutes Cited.

Act of Congress: March 4, 1907, 34 Stat. 288; Lock 12 (Lay) Dam 232
Act of Feb. 20, 1792, 1 Stat. 232.................... 237
Amendment to the TVA Act.......................... 93
Boulder Canyon Project Act, Sec. 1, 45 Stat. 1057.... 93
Certificates of Public Convenience and Necessity Under the Alabama Public Utility Act of 1920, Section 9795, Code of 1923............................. 232
Code of Alabama 1923, Sec. 7197.................... 232
Code of Alabama, Sec. 3627-37, Code of 1907 (Sections 7193-7203, also 10570, Code of 1923).............. 232
Emergency Relief Appropriation Act of 1935 (Pub. Res. No. 11, 74th Cong.)........................ 147
Federal Water Power Act (41 Stat. 1063; 16 U. S. Code 791-823) 133, 232
Inland Waterways Corp. Act, 40 Stat. 360 (1929)..... 210
National Defense Act of 1916, Sec. 124, 39 Stat. 166, 215 ....85, 182
National Industrial Recovery Act, 48 Stat. 195....... 147
Northwest Territory, Ordinance of 1787............. 99
Rivers & Harbors Act of July 3, 1930...........186, 222
Rivers and Harbors Act of 1935 (Pub. No. 409, 74th Cong.) 93, 186, 222
41 Stat. 1063, Sec. 16; 16 U. S. C. 809............... 133
40 U. S. Code, Sec. 303, 27 Stat. 321............94, 109, 184

Constitution of the United States.

Article I, Sec. 8, Cl. 1.........................94, 97, 152, 205
Article I, Sec. 8, Cl. 12............................152, 205

Article I, Sec. 8, Cl. 17 ... 97
Article I, Sec. 9, Cl. 5 ... 123
Article I, Sec. 10, Cl. 2 ... 123
Article IV, Sec. 3, Cl. 2 ... 90, 94, 97, 108, 214

Miscellaneous.

Alber's Our National Constitution, 9 Boston Law Review, 152, 156-7 ... 150
American Bar Assn. Journ., Sept., 1935, John Marshall, One Hundred Years After ... 96
Burdick, The Law of the American Constitution, 181 (1922) ... 156
Message of President Cleveland in 1887, vetoing the appropriations for drouth-stricken counties in Texas 150
Cooley on Taxation (2d Ed., p. 110) and Const. Lim. (pp. 11, 106) ... 150
Duer, Constitutional Jurisprudence (2d Ed., p. 211) .. 150
Farrand, Records of the Federal Convention ... 87, 122, 124, 150
Federalist Papers, No. 41 ... 150
Hamilton, Bank Opinion (Works, Lodge Ed.) ... 76
Hare, American Constitutional Law (I: 242-3) ... 150
James Wilson (Andrews Ed. II: 56-9) ... 150
Jefferson, Opinion on the Bank of the United States, Feb. 15, 1791 ... 150, 156
  Letter to Judge Spencer Roane, Oct. 12, 1915 (Ford Ed. VI: 199; XI: 489-90) ... 150
John C. Calhoun (Vol. III: 36, 37, 41) ... 150
Laski, "Introduction to Politics," 1931, p. 62 ... 177
Madison's Debates, 502, 507, 508 ... 150
Madison's Journal, Aug. 18 ... 87
Madison's letter to Stevenson of Nov. 27, 1830 (Writings, Hunt Ed. VI: 356-7; IX: 411-31) ... 150
Messages of Mar. 3d, 1817, and May 4, 1822 ... 150
II Messages and Papers of the Presidents, p. 735 ... 95
Pomeroy's Equity Jurisprudence, Vol. 5, Sec. 2017 (4th Ed.) ... 233
Powell, Congressional Debates, p. 752 et seq ... 85
  p. 760 ... 86
  p. 438 ... 182
President Coolidge's address before the Budget Meeting on Jan. 21, 1924, and in his Annual Message of Dec. 8, 1925 ... 150

Reynolds, The Distribution of Power to Regulate Interstate Carriers Between the Nations and the States, pp. 48-49 95

Story, Commentaries 155

Tucker, Judge Story's position on the So-called General Welfare Clauses, 13 Amer. Bar. Ass'n Journal (July, August, 1927) 150

Van Holst, Constitutional Law of the United States (p. 118) 150

Warren, Charles, The Making of the Constitution, pp. 599-600 .... 99, 100

pp. 461, 462, 567, 589 .... 121, 150

Willoughby, The Constitutional Law of the United States, 2nd Ed. (1929) 150, 156

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TENNESSEE VALLEY AUTHORITY et al.,
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BRIEF FOR PETITIONERS.

OPINIONS BELOW.

District Court: On motion to dismiss original bill (Rec. I-289*), 8 F. Supp. 893; on motion to dissolve restraining order (I-271), 9 F. Supp. 800; oral opinion at conclusion of argument on final submission (II-1302), 9 F. Supp. 965.

Conclusions of Law:. Record, Vol. II, pp. 1091-1101. These conclusions, stated with relation to the facts set forth in findings entered by the District Court pursuant to Equity Rule 70½ (II-1035), are, in effect, a definitive opinion related to the decisive issues. The findings of fact were not modified by the Circuit Court of Appeals (II-1302).

Circuit Court of Appeals: Opinion, 78 F. (2d) 578 (July 17, 1935); Record, II-1302.

JURISDICTION.

Writs of Certiorari, invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1935 (C. 229, 43 Stat. 938, 28 U. S. Code, Sec. 347), were granted by this Court October 14, 1935.

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*References are to Volume and page of the Record.

FOREWORD.

This proceeding presents for review the constitutional validity of an effort through a corporate agency of the federal government to bring about a *coup d'etat* that would commit the government permanently to the manufacture and distribution of electricity throughout an initial region comprising approximately one-fifth of the population of the United States.

The effort of the agency is to commit the government to this commercial program by actionable contracts to endure, without reserved right of cancellation, for a generation.

The agency has admitted on this record that its proposed additions to the power supply present an economic problem of the first magnitude (II-610).

The program, if established as a precedent by this *coup,* or by custom of the Constitution, or by decision on this record, would open every essential industry and service to direct and permanent governmental competition, by means of preparedness plants, operated commercially while awaiting governmental use.

It would also, in a proceeding to which the states are not parties, establish the pretended right of the government to extract by a commercial manufacturing business, from every navigable stream and headwater tributary, the entire energy of the flowing waters, an asset in the stream beyond time immemorial, heretofore regarded as vested inalienably in the states and their citizens, subject only to regulation in the interest of navigation.

The government has sought no compact among the Valley States; it has silenced the state administrations with a revocable stipend. The basis of the case asserted by the government in their absence from the record, as to the water powers proposed to be commercialized in the program, is that by improving navigation the government acquires a commodity or proprietary right in the use of the surplus waters not even in a discretionary sense necessary for navigation and may compel their passage through the commercial generating units of the federal government, which have no physical or functional relation to navigation.

The record shows that the program is being pressed in the region by this corporate agency by arbitrary and oppressive methods of competition and by action and commitment wholly inconsistent with federal function; for the admitted purpose of accomplishing primary objectives which have no relation to any governmental use or function. The ostensible justification is in order to operate surplus capacity plants constructed or put into operation for the express purpose of commercial production, in order, after having created the surplus, to avoid "economic waste" or "to reimburse the treasury," and at the same time accomplish the primary nonfederal objectives of the power program.

The service proposed will result, either by contracts forced on the private utilities serving the respective areas, or by inevitable exhaustion from competition with this agency, in a monopoly of electric service by the federal government in any area to be taken on by this board. The establishment of the program means the displacement of any practical regulation of utility functions in the service area thus to be taken over or controlled by the government. It would displace the existing processes of regulation by substituting a corporate anomaly of the federal government, subjected to no standard or restraint, with unlimited discretion highly legislative in character.

Petitioners challenge its validity in every aspect, in its entirety and in detail, asserting that program and all of its essentials, the means employed to promote it, its dominant objectives, and its arbitrary methods, do not consist with the letter and spirit of the Constitution.

STATEMENT OF THE CASE.

1. THE SUIT AND CONTROVERSY.

This is a stockholders' suit filed September 13, 1934, by stockholders of Alabama Power Company in the Circuit Court of Limestone County, Alabama—filed in that court because of the necessity of joining nonresident defendants.

The fourteen plaintiffs held 1,229 shares of preferred stock of the corporation. Approximately 1,800 additional stockholders subsequently authorized their names to be added as parties plaintiff (II-444). All preferred stock was issued by the corporation at $92 or more a share. The parties made defendants to the bill are:

—The Power Company and its mortgage trustees, The Chemical National Bank of New York and Guaranty Trust Company of New York;

—The Tennessee Valley Authority (TVA), a federal agency functioning under color of the Tennessee Valley Authority Act of 1933 (approved May 18, 1933, 48 Stat. 58, 16 U. S. Code 831-831cc, Appendix, p. 1), the three directors of TVA, A. E. Morgan, H. A. Morgan and D. E. Lilienthal; also Electric Home and Farm Authority, Inc. (EHFA), an agency of TVA for promoting installment sales of electric appliances generally throughout the Tennessee Valley.

—Eighteen municipalities of North Alabama under or proposing contracts with the Federal Government or with TVA in furtherance of the latter's commercial electric power program in competition with Alabama Power Company. All of these towns and their inhabitants were served with electricity directly by the Power Company except the City of Athens, which owned and operated a municipal system and purchased power for its requirements from the Power Company until the Tennessee Valley Authority entered into contract with the city to supply it for twenty years, conditioned upon control by TVA, as stated below.

All of the other defendant towns have made or propose applications for no-recourse loans from the government with which to construct competitive systems to be supplied under its standard 20-year contracts by TVA.

A statement as to the bill of complaint, the manner in which the controversy is presented in this stockholders' suit, the overt acts in the program directly affecting the Alabama Power Company, the final decree and appeals, will follow a general statement of facts as to the commercial electricity program of TVA which is the basis of the controversy and is necessary to be outlined at the outset.

The suit was removed to the District Court by the TVA and associated defendants.

The petition for removal (I-120) asserted that the controversy directly involved and presented for decision

> * * * "(5) the legality of the entire program of the respondent Tennessee Valley Authority under the Tennessee Valley Authority Act and the Constitution of the United States."

That statement is correct if limited to the commercial electricity program of the government (TVA), as superimposed upon the ownership of a plant obsolete or oversized for any war or federal purpose and upon an indefinite number of "multi-purpose" dams constructed or to be constructed in the Tennessee River and its tributaries and equipped with hydro-generators in known and intentional excess over any federal requirement; the commercial business thus superimposed on the several plants having no actual or ostensible physical or functional relation to war, navigation, or any federal function.

The TVA electricity program is challenged on this record insofar as it proposes absorption or exhaustion by the government of the franchises, utility properties and going business of the Power Company, either (1) by direct or commercial utility competition by the government (TVA), or (2) by executory contract obtained from the Power Company under the circumstances shown on this record for the purchase by TVA of utility property, expressly and solely designed for commercial operation by the government in state domain, or (3) by federal investment establishing utility systems in local communities under contract to purchase TVA power, accompanied by contracts under which the local rates and other functions of management of the system were in vital respects reserved to TVA.

These acts and functions are all contended by plaintiffs to be illegal *per se* because working a direct violation by the government of the restriction upon its powers under the Constitution.

The decree and conclusions of law of the District Court pretermitted consideration of the validity of the Tennessee Valley Authority Act, the court contenting itself with the conclusion that the operation of the commercial manufacturing and distribution program, in the execution of which the enjoined actions were proposed by TVA, was necessarily in violation of the Constitution, could not be authorized by Congress, and that, accordingly, the interpretation, scope or validity of the statute was immaterial.

The specific acts and transactions made the basis of the controversy (viz.: commercial and non-federal manufacture, distribution and sale of electricity by TVA from steam plants and from hydro-electric installations, at which the electricity is intentionally manufactured by the government for commercial sale in furtherance of its electric network, utility in type and permanent in character) were averred to be a part of a region-wide utility or commercial program of TVA, having dominant non-federal objectives, and in detail in violation of the restriction upon federal powers.

It was also averred that this program was, in turn, part of a national power policy of the present Administration not permitted by the Constitution.

2. THE TVA ELECTRICITY PROGRAM IS PART OF A NATIONAL POWER POLICY.

That the TVA electricity program is an integral part of a nation-wide power policy of the present Administration is attested on this record by the direct public statement of the general counsel of TVA and its director in charge of power, the defendant Lilienthal, publicly circulated by TVA following the adoption of corporate resolutions that such releases must be official (II-531, 533-4), made in these words:

> "We have been given a national power policy to execute in the Tennessee Valley." (II-634)*

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*To same effect, II-566, 597, 581, 595, 598, 606, 639, 652, 702-3. See also II-641-2, with reference to TVA's contract to purchase as a going business the electric properties of the Tennessee Public Service Company:

"The activities of the Tennessee Valley Authority in the area * * * are in execution of policies of the entire nation. In making a maximum offer of $6,550,000 (for the going utility system of the Tennessee Public Service Company), Director Lilienthal * * * said in conclusion: The Tennessee Valley Authority has entered into these negotiations in an effort to find a peaceable * * * way of carrying out * * * a national policy * * *."

> "The Tennessee Valley Authority marks the beginning of a new national power policy and national power program. The first objective is more effective protection of the public interest, by the setting up of a measure of public operation of power as a 'yardstick'. * * *
>
> "The President and the Congress have set themselves to the task of putting to work the vast sources of electricity which lie idle and unused. **We are working toward no less a goal than the electrification of America.** * * *" (II-606, I-112.)

It was so recognized by the Administrator of Public Works, Chairman of the National Power Policy Committee*, as shown by the stipulation in evidence in lieu of his testimony (Finding 110[c], II-1076):

> "That the Administrator of Public Works regards that part of the Tennessee Valley Authority program relating to the generation, transmission and sale of power as constituting a part of the general policy and program of the National Administration." (II-684.)

The public release by TVA dated January 14, 1934 (I-113) recognizes that the program is related to a federal electricity program intended to reach "every town and city and village and every farm throughout the country."

The Federal Emergency Administration of Public Works, by instructions to its staff dated November 8, 1933 (II-694), instructed its field representatives in the states that:

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*On July 16, 1934, the President established in the Public Works Administration a National Power Policy Committee, of which Public Works Administrator Ickes was Chairman. The defendant Lilienthal, general counsel and director in charge of power of TVA, was a member. "The duty of this Committee is to develop the plan for the closer cooperation of the several factors in our electrical power supply * * * whereby national power policy in power matters may be unified" (II-697).

> "We are most anxious to set up around the country sound publicly owned utilities as yardsticks * * *"

The corporate minutes of TVA accept the President's public statement of his conception of the functions of the TVA federal yardstick program as an organic basis and part of the Act and program (Minutes, Oct. 13, 1933, II-543):

> "(c) President Roosevelt has uttered publicly that one of the functions of the operation of Muscle Shoals is a 'yardstick' by which to measure the reasonableness of electric rate charges. In view of his sponsorship of this legislation, the yardstick idea must be taken to be definitely a part of the policy embodied in the Tennessee Valley Authority Act."

The President's conception is reflected in the Executive Message of April 10, 1933* (Record, I-106), requesting the creation by Congress of the Tennessee Valley Authority; also in the St. Lawrence Treaty Message referred to below; also in the Portland Address referred to in the public release by the Federal Power Commission mentioned below, *et passim.*

The TVA Message called for a corporation, to be "clothed with the power of government but possessed of the flexibility and initiative of a private enterprise," not only to be charged with the duty of planning for the development of the natural resources of the Tennessee River drainage basin and adjoining territory, for the general social and economic welfare of the nation, but to be clothed with the necessary power to carry these plans into effect. Specifically, the Message urged that the agency be charged with power and duty to rehabilitate and co-ordinate the Muscle Shoals development with the wider plan, involving many states and the future lives and welfare of millions. "It touches and gives life to all forms of human concerns" (*ib.*).

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*Executive Message, April 10, 1933, House Document No. 15, Cong. Rec., 73d Cong., 1st Sess., pp. 1407-8.

The same nation-wide conception is reflected in the President's repeated public references to

> "four great power areas in the United States, each to serve as a yardstick, and each to be controlled by government or governmental agencies. The Tennessee Valley plans and projects in the Southeast, the Boulder Dam on the Colorado in the Southwest, the Columbia River projects in the Northwest, are already under construction. The St. Lawrence development in the Northeast calls for action"* (I-19).

Another member of the National Power Policy Committee (supra, p. 7, note) in a statement released by the Federal Power Commission, of which he is Chairman, stated that the Tennessee Valley Authority program is part of "a broad general plan that is national in scope and service," and directly related it to the initial conception stated by Mr. Roosevelt while a candidate for President at Portland in September, 1932 (II-702).

The foregoing references are representative of a score of similar authentic declarations in this record†, and not quoted above, demonstrating that, whatever be the interpretation of the Act, the program of TVA as formulated and administered by TVA is, in fact, a part of the conception underlying the Adminstration's announced power policy that the commercial manufacture and region-wide distribution of electricity for the purpose of regulation and general welfare is a function of the federal government by direct action and by federal investment in publicly owned utilities as yardsticks; and that the direct operation by TVA and the financing by the federal government of competitive transmission lines and distribution systems (in Alabama carrying no pecuniary obligation on the agency and dominated as to rates and other salient utility characteristics by TVA) to purchase the power thus manufactured by the federal government is likewise a federal policy.

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*St. Lawrence Treaty Message, Senate Document No. 110, Jan. 10, 1934.

†A representative cross-section of the public releases circulated by TVA is found in Exhibits 4, 7, 9 and 11 to the bill of complaint (I-111, 165, 170, 187), stipulated and found by the court (Finding 117, II-1078) to be correct excerpts. Representative releases are to be found in the record at II-580-656; the minutes of TVA offered in evidence are at II-531-571.

The facts bearing on the lack of relationship to the regulation of navigation or the war or property clauses of the Constitution of this program for commercial manufacture and sale of electricity in the operation of a utility system in state domain, will be stated below.

Brief summary will be made of the overt acts of the Administration in making effective the program, which have a bearing upon the objective of the TVA program directly under consideration in this case. As to the proposed investments of federal funds in no-recourse systems to distribute TVA power in Alabama, the facts will be rigidly condensed as to the proof that the investments (generally called loans and grants) were (1) in direct furtherance of the TVA utility program, (2) for a purpose conclusively local, and (3) accompanied by circumstances that carried participation by the government in the function beyond the making of the loan or investment.

3. OVERT ACTS IN EXECUTING THE ELECTRIFICATION PROGRAM OF THE ADMINISTRATION OF WHICH THE TENNESSEE VALLEY AUTHORITY IS A PART.

The original statement of the conception was the advocacy of the development **by the federal government** of power areas as "a national yardstick to prevent extortion against the public," as stated in the Portland Address. See infra. After the election, the four projects to serve as yardsticks which had been mentioned in the Portland Address and in the St. Lawrence Message, were elaborated by the President, under color of Title II of the National Industrial Recovery Act (48 Stat. 195), to include, according to the public release of the Federal Power Commission, in addition the Grand Coulée and Bonneville dams in the Northwest, Fort Peck on the upper Missouri, and the Seminoe Dam in Wyoming (II-703)*, and has now been recognized as including all major power projects constructed or financed by the government†.

The principal generating systems, in addition to TVA, designed in whole or in substantial part for power manufacture, constructed or under construction directly by the federal government or by means of federal investments include:

Booneville, Boulder, Bluestone, Casper-Alcova, Central

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*Official release by Federal Power Commission, December 10, 1934, of statement by its Chairman, a member of the President's National Power Policy Committee, (II-697).

†There is in evidence (II-1264) the public release of the Federal Power Commission, speaking for the President through its Chairman, a member of the National Power Policy Committee, dated December 17, 1934, in which an objective of the federal Administration is stated to be:

> "It is the purpose of the Administration to narrow this excessive gap between what the consumer pays for electricity in this country and what Canada has proven it can be generated and sold for. * * *"

Valley (steam-electric plant projected), Fort Peck, Grand Coulee, Loup River, Parker, Platte River, Santee-Cooper, and Passamaquoddy[*]. See Map C, attached to this brief.

All of these projects are being constructed under color of the National Industrial Recovery Act of June 16, 1933, except Boulder (45 Stat. 1057), and with the exception of Grand Coulee and Parker, which are being continued under color of the Rivers and Harbors Act of August 10, 1935 (Pub. No. 409, 79th Cong., adopted after the decision in *United States v. Arizona,* 55 Sup. Ct. 666, 79 L. ed. 681).

The initial federal investment in these basic projects, cording to the announced allotments and unofficial estimates of cost of construction of the initial stages now in process of development, reach a total of approximately one billion and the ultimate proposed development a total of three billion dollars[†] taking no account of the projects pending in Congress, the St. Lawrence or any not already in the announced allotments of the federal government.

The electricity potential at these undertakings is estimated to be in excess of 125 billion kilowatt hours of electric energy annually as compared with 89 billion 500 million kwh total energy generated for distribution in the United States in the year ending August 31, 1935.* This vast increment of power is impossible, as a matter of common knowledge, of marketing except in commercial competition by the federal government (or by agencies supported by it) throughout state domain in competition with an existing public utility investment of more than $12,000,000,000, which patterns the nation, under public regulation.—See Map B attached to this brief, showing existing utility systems in the TVA area.‡

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[*] Booneville (Washington): War Department, Federal Project No. 27, Federal Project No. 28.
Bluestone (West Virgnia): War Department, Project No. O. P. 13-322.
Casper-Alcova (Wyoming): Bureau of Reclamation, Project No. O. P. 05-4.
Central Valley (California): Bureau of Reclamation, Project No. O. P. 05-24.
Fort Peck (Montana): War Department, Project No. O. P. 13-29.
Grand Coulee (Washington): Bureau of Reclamation, Project No. O. P. 05-5.
Colorado River Project (Texas): Bureau of Reclamation, Project No. O. P. 05-3.
Passamaquoddy (Maine): War Department, Project No. O. P. 13-1.

References to particular project numbers of other dams could not be obtained.

[†] See Bulletin, Edison Electric Institute, June 1935, p. 202, to which are to be added Central Valley ($170,000,000), Passamaquoddy ($36,000,000), Bluestone ($12,900,000), Santee-Cooper ($37,500,000).

The announced projects in the federal program include (as in the case of TVA methods of distribution) various forms of federal participation and control in the scheme for commercial power generation, transmission or distribution, ranging from loans to responsible borrowers made under the Administration's interpretation of the tax-spending power delegated to the President, to projects involving direct and permanent federal utility operations "from power house to consumer", as in the case of TVA.

The federal participation in or control of distribution, including rates, as exercised as to all power marketed by TVA, is in sharp distinction from the contracts negotiated for the Boulder Project in 1930† where the government has leased the emplacements to municipal or private corporations.

Because of that fact, the records are not available to supply reference as to the reason why the President has included that project in the schedule of his federal yardstick power areas, unless it may be inferred to be the intention of the Administration that as to the capacity not already committed it has been the intention to put the government in the business of commercial manufacture and distribution either directly or through some controlled or colorable agency. However that may be, Boulder was expressly included among the projects characterized as federal power projects, both in the Portland Address in 1932 and in the St. Lawrence Message in 1933, supra. This reference remained without further official elucidation as to Boulder until the President's recent Address at Boulder Dam, September 30, 1935:

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*U. S. Geological Survey, published by permission in Bulletin, Edison Electric Institute, October, 1935.

†See "The Hoover Dam Contracts", Wilbur and Ely, Gov't Printing Office, 1933. If the Boulder Canyon Project Act (45 Stat. 1057) purports to authorize direct commercial manufacture by the federal government, the published report of the contracts does not indicate that any attempt was made to exercise the power under the Administrations in charge of the project when the contracts were negotiated and the work begun.

‡See II-610, 611 for release of TVA stating grave surplus capacity.

> "It is my belief that the government should proceed to lay down the first yardsticks from this great power plant **in the form of a State power line,** assisted in its financing by the government, and tapping the wonderful natural resources of Southern Nevada. Doubtless the same policy of financial assistance to State authorities can be followed in the development of Nevada's sister State, Arizona, on the other side of the river." (Release—Executive Office; emphasis supplied.)

This offer of federal financial assistance includes the established practice of the Administration in allotting grants and loans under the National Industrial Recovery Act to make the entire investment through a state or municipal corporation without assets, frequently (as in Alabama) either prohibited by the State constitution from incurring any pecuniary liability or stating in the face of the statute adopted in the form requested by the federal government that state public revenues are not to be involved.*

At the opposite extreme of the federal yardstick participation pursuant to the current national policy outlined under this heading, through actual or nominal **State lease of emplacements** and **state distribution,** is the Tennessee Valley Authority, the program of which, as stated in its minutes for Oct. 13, 1933 (II-543) requires that TVA engage

> "Not only in the generation, but participate in the transmission and distribution of electricity, since the latter two phases of electric service represent the most important part of the cost of such service. A public yardstick to have value necessarily means public operation from power house to consumer's premises."

These federal projects in the national yardstick power program also include the commercial generation or proposed generation of electricity directly by the government at the inland steam plants in Mississippi purchased by TVA and at the steam electric plant at Muscle Shoals, none of which have any putative relation to navigation; also the generation of electricity by the government at commercial hydro-generators installed in multi-purpose dams where the installation and operation of the generating equipment was proven and found to have no physical or functional relation to navigation (Infra p. 57 et seq.);

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*The Alabama Rural Electrification Authority Act, infra, adopted at the request of PWA, contains repeated disclaimers of any tax or state responsibility, including:

"Section 15. Bonds of Authority Not Debts of State.—No holder or holders of any bonds issued under this Act shall ever have the right to compel any exercise of taxing power of the state or of any political subdivision thereof to pay said bonds or the interest thereon. Each bond issued under this Act shall recite in substance that said bond, including the interest thereon, is payable from the revenues pledged to the payment thereof, and that said bond does not constitute a debt of the state."

and where the generation of power for commercial distribution is the dominant purpose not only of the design of the dam, but the installation of the equipment. It was testified by the Chairman of TVA that but for proposed commercial manufacture and distribution of electricity by the government navigation or low dams would be indicated instead of the high dams (II-406-7).

These federal generating plants occur, as stated, not only inland and in navigation dams, but in dams such as at Norris and Passamaquoddy, which constitute an obstruction to the transit of navigation. In the case of the latter, the President's Advisory Committee on Allotment (Release, May 16, 1935) calls the project "the Passamaquoddy Bay Tidal Power Project" and describes its purpose as follows:

> "The purpose of the project is development of cheap hydro-electric energy by harnessing the tides of the Bay of Fundy."

At the time this brief went to press petitioners had been unable to ascertain that the State of Maine had consented to set up a corporation or other agency either to assume nominal or tangible responsibility for this federal project, now being constructed by the Corps of Engineers under the initial allotments.*

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*"There was no doubt about the Federal Government's power, under the Relief Act, to build Passamaquoddy, but there was doubt as to the Federal Government's power, after the dam was built, to operate Passamaquoddy and not have it as a 'white elephant.'

"For that reason, the legal division of the Public Works Administration had always and consistently insisted that, before any money went into the construction of the Passamaquoddy project, the Maine Legislature should create by legislation of the Maine Legislature a local authority, which was to be called the 'Maine Power Authority.'"—Testimony of Hon. Thos. G. Corcoran, before Committee on Rules, House of Representatives, Hearings on H. Res. 288, 74th Cong., 1st Sess., July 9, 1935, p. 27.

A further publicly announced unit in the Administration's direct participation in the function of "generation, transmission and distribution of electric energy" was the establishment of the federal Rural Electrification Administration, by Executive Order No. 7037 (May 11, 1935):

> "to initiate, formulate, administer, and supervise a program of approved projects with respect to the generation, transmission, and distribution of electric energy in rural areas."

This Executive Order purports to **authorize the Administrator** established by the order to acquire by purchase or by the power of eminent domain any real property and improve, develop, sell, lease or "otherwise dispose of it." (ib.)

(If, as contended by TVA on this record, the power to "dispose of" property carries the power to operate it commercially and make it the basis of a permanent integrated industry from raw material to consumer, then the President by this Executive Order has given this agency a legislative letter of marque to establish and operate federal yardstick utility systems at will.)

In addition to the allotment of federal funds in furtherance of this national policy under color of Title II of the National Industrial Recovery Act (48 Stat. 195, 40 U. S. C. Sec. 401, et seq.) and under color of the Emergency Relief Appropriation Act of 1935 (Pub. Res. No. 11, Approved April 8, 1935), and in addition to the basic power manufacturing projects scheduled above, there are pending before the present Congress a series of bills for the federal construction and operation of projects for the commercial manufacture and distribution of electricity in known and intentional excess of any federal requirement, on the same national power theory as the TVA, containing the same or similar recitals or preambles as to war and navigation, as the TVA Act. Some of these are referred to in the margin.*

The approved projects mentioned below do not include the numerous cooperative, municipal or local "Power Authority" projects or local Rural Electrification Authorities which have been created at the request of the Administration to act as local agencies to carry out the federal program. These measures have been adopted by various states in substantially identical form, referred to in various executive messages as having been requested by the Administration. Examination of those adopted in Alabama and Tennessee indicates that they are expected to handle the federal investment in large part, if not entirely, without investment of their own, or pecuniary obligation or responsibility, operating on a revenue basis as an agency of or for the account and at the risk of the federal government, and, as shown on this record, where supplied by TVA current, to be under control by the latter as to rates, utility regulations and other basic functions of management.

Typical of this latter class is the "Alabama Rural Electrification Authority," a corporation without assets created by the Act of the Legislature of Alabama approved February 7, 1935 (Act No. 47) at the request of the Federal Administration.*

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*Appalachian Authority (Monongahela River and Kanawha River basins) H. R. 3622; Columbia Valley Authority (Columbia River, Grand Coulee Dam, Washington, Bonneville Dam, Oregon) S. 869. See also H. R. 2790, H. R. 5449, H. R. 4122; Central California Valleys Authority (Sacramento and San Joaquin Rivers) H. R. 5429; Connecticut Valley Authority, H. R. 4979; Upper Mississippi Authority, S. 98, H. R. 4683, H. R. 4684, H. R. 4685; Missouri Valley Authority, H. R. 4241; Mid-Continental Reclamation Commission, H. R. 4676, proposing to amend the Tennessee Valley Authority Act to include Tombigbee River and Bear Creek Basins; same, S. 1400; also like amendment to include Cumberland River Basin, S. 230.

Similar no-asset corporations were created or authorized by the legislatures of Tennessee and Alabama to act as agencies to distribute TVA power.†

A partial description of the federal public works projects for electric systems of the type which PWA is most "anxious to set up around the country * * * as yardsticks," (Supra, pp. 7-8), may be summarized in broad outline as follows:

In addition to the basic projects stated above, in which large scale manufacture of electricity for commercial transmission and distribution is being developed or is potential, announced federal public works allotments for what may be called municipal, state or district electric systems include every state except New Mexico, embracing, in addition to non-competitive projects, approximately 83 new projects, local in character, which are competitive with existing regulated utilities, and in which federal participation ranges from 100% gifts to 100% loans, according to the discretion of the President. See Map "C."

No-Recourse Loans and Investments.

In a number of instances, by reason of Constitutional or other limitation upon the right of the municipality to incur pecuniary obligations, the "loan" is in fact a no-recourse revenue-investment, carrying no investment, pecuniary liability, risk or obligation on part of the grantee except the covenant with the government that the system shall be operated for the account of the government until such part of the cost as the President stipulates shall be repaid out of operations.

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*By public announcement (Associated Press) on October 2, 1935, the Chairman of this agency advised that "Rural residents who wish ever to obtain the benefits of the Government electrification program should be sure not to sign any agreement with any private power company."

†Tennessee Acts, First Special Session 1935, pp. 63, 76, 265, approved July 25, July 29 and August 3, 1935; Alabama Acts Nos. 40, 42 and 45, approved February 7, 1935.

Where, as in Alabama, the distributing agency is to be supplied with power by TVA, the so-called borrower is required, in order to conform to the yardstick theory*, to yield to the determination by TVA of the rates, service regulations, accounting and the disposition of earnings and reserves: in short, in all or substantially all of the towns in Alabama, being financed by the Federal Government in order to set up systems for distribution of TVA power, the entire investment, the entire equitable interest, the entire control, the basic privileges and duties of management are exercised by the Federal Government. The nominal owner is under covenant to operate the system for the account of the government.

Such is an outline of some of the principal units, which along with TVA have thus far been officially announced in the national power policy of the present Administration. They are outlined in this brief because directly and admittedly related in purpose and in privity with the TVA program and because they are deemed by petitioners to constitute the pattern which, petitioners will argue below, determines the dominant objective of the units in the Administration's national power policy and are decisive as to their transgression of federal power,* in addition to the intrinsic invalidity of the transactions here involved.

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*TVA minutes, Oct. 13, 1933, II-543, Par. (d). See, for basic terms of contract, Minutes, II-550; See, for definitive forms of contract, II-1202 to 1215, 1216. Express power to fix resale rates where power is sold to municipal subdivisions of the States, was lacking under the original TVA Act. See Sec. 10 and Sec. 12, purporting to authorize TVA to fix the resale rate only as to private distributors. TVA vigorously sought before Congress and obtained purported authority, in the Amendment of August 31, 1935, to prescribe resale rate schedules in any contract for sale of TVA power. The intent to dictate resale rates for all power sold is a fixed element in the TVA program. It is to be noted that in the Boulder leases no effort was made by the Secretary of the Interior to follow the Government's investment beyond the dam either by rate control or other domination of the management.

4. THE TENNESSEE VALLEY AUTHORITY PROGRAM.

(a) Dominant Objectives.

The objectives of the Tennessee Valley Authority power program are as thus stated in its official release of January 6, 1934 (II-623, at p. 624):

> "The power policy written into the Tennessee Valley Authority Act represents an attempt to regulate public utilities not by quasi-judicial commissions, but by competition. The Act definitely puts the Federal Government into the business of rendering electric service. The Authority is required to acquire a market, to set up an area in which to conduct its operations. The results of these operations in this limited area are intended to serve as a 'yardstick' by which to measure the fairness of the rates of private utilities, and to prevent destructive financial practices by private utilities.
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> "* * * In carrying out this competitive relation between the Federal Government and the private business of electricity, the wastes of competition are to be eliminated, and the regulatory function of competition emphasized."†

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*The resolution of the Federal Emergency Administration of Public Works determining upon an allotment for a competitive system for the dependent towns, expressly recited that the allotment was in furtherance of the TVA program (II-686), Administrator Ickes' telegram (I-60, II-683), the showing in lieu of his testimony (II-683), the loan-contracts themselves (II-685), leave no basis for contrary argument and the District Court so found (Fng. Nos. 109, 110, II-1073).

†See also quotations from TVA minutes, supra, pp. 8, 15.

The District Court's finding of the primary objectives of the TVA program (II-1059-1060; Nos. 70-71) includes, in addition to the purpose to regulate intrastate utilities and exercise the functions of state commissions, quoted above, the following, ***inter alia***:

> —promotion of public ownership of electric utilities;
> —the control of the utility functions of TVA distributors;
> —to earn a profit, in order to reimburse the Treasury and round out the system;
> —social betterment, general welfare, promotion of use of electricity and prevention of waste.

The TVA minutes for October 13, 1933, quoted above (p. 15), after the statement that the yardstick required operations "from power house to consumers' premises," recited that, "It is for this reason that the authority has adopted a policy of rate and accounting control of municipal distribution operations." The minutes of this date set forth the policies of the Board with reference to various alternative bases "for negotiations with private utilities." The first suggested alternative proposed the sale of the entire power output to the private utilities, subject to resale price restrictions under Sec. 12 of the Act. This suggestion was forthwith rejected by the Board, the minutes reciting "that negotiations on this basis cannot be entered into" (II-540).

The essential characteristics of the program were declared in the findings to have no relation to any federal function (No. 73,* II-1061). The program was formulated:

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*"73. It is found by the Court that utility service in the area, that service equivalent to utility service and that long term contracts for the service by the Government of the type, character and extent of the TVA contracts disclosed by the evidence in this case have no direct, necessary or reasonable relation to any Governmental function."

> "from the standpoint of the successful establishment and permanent operation of an independent and well rounded government-owned electric distribution system and the general civic, social and industrial planning and development of the Tennessee Valley region as a whole" (Fng. 26, II-1042).

The plan contemplated not only generation but transmission and distribution, both wholesale and retail (II-1059, Fng. 68).* The conception was to establish an independent network comparable in all respects with the electric utility systems serving the area (Fng. 69,** II-1059).

The power policy is not designed or limited with a view to marketing of power produced merely at Muscle Shoals (Fng. 26, II-1042). It contemplates long term commitments, utility in type (Fngs. 32, 33,† II-1045), under 20-30-50 year contracts made actionable by the Act.‡

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*"68. This policy contemplated service utility in type and covered not only generation but transmission and distribution (preferably through public or non-profit agencies, if available) both wholesale and retail. That is, moreover, implicit in both the January 4 contract and the now terminated August 9th contract."

**"69. The conception was to establish an independent network comparable in all respects with the electric utility system serving the area, with which TVA sought to establish interchange arrangements, both as outlets for its own power and to use existing systems as a stand-by or back-up service."

†"32. From the outset, TVA has considered that its power service, to the extent undertaken, must be the equivalent of existing utility service and must have the same characteristics and stability, including back-up or stand-by facilities, and interchanges with neighboring systems now common with existing systems and already fully practiced in the area. None of the contracts in evidence for sale of power by the purchaser reserved the right of termination except for breach."

"33. Commercial sale of the power for profit under a power policy or program as shown by the evidence in this case necessarily requires a commitment for continuous availability, for long periods."

‡Sections 5 (n) and 24 of the Act authorized a contract for sale of power to a possible lessee of the nitrate plants, the lease and therefore the power supply, being authorized to be entered into for fifty years. Section 10 authorizes definitive contracts for sale of power for 20 years; Sections 12 and 24 authorize 30-year power contracts.

There can be no doubt on this record that a contract commitment of the government to the commercial manufacture and sale of power for 20 to 50 years involves, **as a matter of fact**, permanent foreclosure of any change in legislative policy by Congress as to the utility servitude thus assumed or as to the "disposal" of government property (Fngs. Nos. 26, 28, 32, 33, II-1042-5; Concl. of Law No. 2, II-1091, and 17, II-1096).

(b) Territorial Scope of TVA Electric Network.

Section 11 of the TVA Act requires equitable distribution throughout the radius of transmission, which by current practice is accepted at 250 miles. The TVA program "contemplates full corporate discretion by TVA in developing and extending its electric system and service within transmission limits" (Fng. No. 67, II-1059). Map "A" shows that this area will reach almost from the Great Lakes to the Gulf, and from central Missouri and Arkansas to the Atlantic Ocean at Charleston and Savannah, embracing an area of 275,680 square miles, and a population of 24,400,000. The TVA official release of October 22, 1934 (II-651) describes as within the area of power distribution, Little Rock, St. Louis, Terre Haute, Asheville and Cincinnati, "wherever power can be transmitted from generating plants along the Tennessee River and its tributaries."

The first formal announcement by the Tennessee Valley Authority of its power policy, released August 25, 1933 (Bill of Complaint, Exhibit No. 3, I-108-110*) selected as

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***And adhered to in all subsequent official statements of the TVA power program. See TVA Annual Report for 1934, Gov. Pt. Off. (House Doc. No. 82, 74th Cong., 1st Sess.); Chairman Morgan, II-399.**

the initial area for service* the drainage area of the Tennessee River and all of the Tennessee lying to the East, accompanied by the declaration that the Authority may go outside the area as part of the initial program because of any reason deemed by it appropriate, such as non-cooperation of the privately owned utilities (Findings 64, 65, 66, II-1057). Applications for power were invited without limitation as to location. A basic reason stated to be sufficient to justify extension of the initial system outside of the Tennessee basin, would be "high rates for service and a failure or absence of public regulation to protect the public interest" (Fng. No. 66, II-1058).

This conforms to the co-ordinated program of the Federal Emergency Administration of Public Works as a part of the national power policy under which the PWA is "most anxious to set up around the country sound public utilities as yardsticks" (release, Nov. 8, 1933, II-693-4), particularly where they would by means of the federal contracts be able to establish substantially lower competitive rates than otherwise in effect (release No. 989, II-694, 697).

Administrator Ickes and the defendant Lilienthal make plain that the cooperative policy of TVA and PWA was to hold open federal "loans" to municipalities for competitive systems until the utility either sold out to TVA or its privies or (outside of TVA area) **permanently** reduced its rates (I-60, II-511, 514-519, 644, 646, 662, 663, 683, 695, 696).

It has already been stated (Supra, p. 19) that the Administration has announced allotments of federal funds for eighty-three electric systems (Map "C") to compete with existing systems already serving the particular area, and subject to state regulation. These include ten municipal areas in Alabama within the public service undertaking of Alabama Power Company, two in the heart of the Birmingham industrial district a hundred miles south of Muscle Shoals, to which were allotted $1,567,273 of federal funds for a high tension line to transmit, and for distribution systems to retail TVA power in displacement of electricity supplied by Alabama Power Company.

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*The initial area was to be served by the amount of power already available at the Muscle Shoals steam plant (60,000 kw. capacity) and at the hydro-generators (50,000 kw. continuous or "firm" capacity) installed on eight out of eighteen available emplacements in Wilson Dam (Fngs. 49-62, II-1049).

On this record no significance is to be attached to the ostensible territorial limitations to the Tennessee Basin tentatively set in the initial plan, as originally announced on August 25, 1933, as that limitation was referable to the then existing volume of primary power available from the Muscle Shoals steam plant and Wilson Dam, and was intended to be effective pending completion of additional commercial units.

Wheeler and Norris are nearing completion. Funds for additional dams were made available in 1935 (see infra p. 55) and construction has begun on Pickwick. In addition to the $50,000,000 made available to TVA by section 15 of the original Act without further appropriation by Congress, the amendment of 1935 granted authority to issue an additional $50,000,000 of bonds to finance municipal distribution systems. No further Congressional action is necessary.

As recently as September 24, 1935, the defendant Lilienthal, General Counsel and Power Director, publicly announced Board approval of a 250 mile loop line west of the initially announced area, to serve eight municipalities, carrying potential rural electrification of twenty-five counties,[*] and TVA has publicly announced the signing of a 20-year contract on November 23, 1935 to supply power for the city of Memphis.

The statement is accordingly justified that the TVA Act requires and the program as announced and in execution contemplates the extension of the service area of TVA in all directions from the steam plants and power dams as they are constructed or acquired, speeded by the combined action of the two revolving funds of $50,000,000, each, made available to TVA, and unlimited funds in the public works program discretionary with the President.

(c) Commercial Utility Characteristics of the TVA Program.

The program involves the complete commercial service of electricity by TVA, with all of the functions of a utility system dedicated permanently to the public service. The District Court's specific findings of fact relating to that phase of the service include: Nos. 26, 28, 32, 33, 68, 69, 85, and 89[†] beginning at II-1042.

The conclusions of law also restate decisive findings of fact, e. g., No. 17 (II-1097):

"The plan and program of the Tennessee Valley

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[*] "A full development of our present plans will result in one of the major rural electrification projects of the entire country."—TVA Public Release, September 24, 1935.

[†] Finding No. 89 (II-1068) is as follows: "All of the electric properties and facilities covered by the contract of January 4, 1934, as well as the Athens distribution system covered by the Lilienthal-Willkie letters dated May 24 and May 28, 1934 (Pl. Ex. 23), as well as the urban distribution systems covered by the contract of August 9, 1934, were used and useful for and were contracted for by TVA for the purpose of providing a market for power through and by means of the operation of the properties in the rendition of utility service and as a substantial means and part in the power program as herein outlined. They were contracted for by TVA for the purpose of continuing and enlarging the utility service for which they were used by the respective power companies."

> Authority, in furtherance and execution of which the Tennessee Valley Authority entered into the contract of January 4th, 1934, is a plan and program for the operation by Tennessee Valley Authority of a system for the generation, transmission and distribution of electricity. Its proposed functions are utility in type. Under its contract with the various municipalities to be served the service is to endure for at least twenty years, and involves a service which by reasonable implication is permanent in its nature. * * *"

The public release by TVA dated January 5, 1934, descriptive of the contract of January 4, 1934, under which TVA undertook to acquire the going business of the power companies in the ceded areas with all customers attached, recognized the utility functions of TVA in these words:

> "The essence of this agreement is the recognition by the power companies who are parties to the arrangements that the Tennessee Valley Authority is **under a duty to operate a public power business, directly and through public agencies,** in order to provide a public 'yard-stick' of the fairness of the rates charged by privately owned utilities" (II-622).

By Section 4 of the contract itself the power companies severally covenanted to transfer the "franchises, contracts and **going business,**" and to "transfer said properties **with all present customers attached.**"

The plan and program, as well as the Act, contemplate direct and continuing service from power house to consumer [II-543, subdivision (d)].

At the time this suit was filed the going businesses and customers proposed to be taken over **immediately** by TVA were summarized by the District Court as follows (Finding No. 74, II-1062):

System contracted to be taken over	No. of counties in area served	Population of Counties	No. of direct customers
Miss. Power Co.	10	184,640	4,000
Ala. Power Co.	6	193,423	10,000
Tenn. Elec. Power Co.	9	86,388	2,500
Tenn. Pub. Serv. Co.	5	227,442	26,000
	30*	691,893	42,500*

*Erroneously printed in the Record as "50" and "43,200."

Every phase of utility service is involved, including the construction or acquisition of plants, both steam and hydro-electric, for the manufacture of electricity; also transmission and distribution lines for deliveries, both at wholesale to distributors and at retail to consumers. The continuation of the service thus at any time undertaken as part of the plan is to be made obligatory upon the government for the duration of contracts, actionable under Section 4 of the Act, and, by practical and necessary effect, permanently.*

If the government desires to recapture this power for governmental uses, it must in effect condemn the contracts (Section 20), and pay full damages for the termination of the service. None of the contracts reserve the right of termination for any purpose.

The commercial electricity program is entirely separate from and unrelated to government use of power (Findings of Fact, Nos. 26-28, 34, 73, 86, 91, 104, 106, 118).

After completion of the construction work projects, calling for substantial amounts of power, the plans for governmental use of power to be manufactured at the steam and hydro plants are indefinite, and call for a negligible proportion of the primary and secondary capacity of the commercial units installed or provided for (Findings Nos. 34,[*] 49 through 62, 105, 107). The amount of commercial power now or shortly available (and being committed by fixed 20- 30- 50 year contracts by TVA) was shown by the findings (Fng. 62, II-1056-7) to range up to sixty times the governmental requirements from Muscle Shoals, Wheeler and Norris **alone**, even with the assumption that the present formless fertilizer plan is continued. With or without that requirement the record makes indisputable that the TVA program contemplates intentional manufacture of enormous quantities of power for permanent commercial distribution. The continued execution by TVA of large 20 year commitments for firm power and the plan and program itself are conclusive as to the fact that the program is based on an intent to manufacture power in known and assured continuous excess of any and all governmental requirements.

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*Sections 5, 12, 24 of the Act.

(d) The Integration of All TVA Sources of Power.

It is admitted by TVA that the plan and program contemplates an interconnected pool of all of its power sources (Finding No. 90;[†] II-400, 401, 413, 669), including the steam-electric plants already acquired or controlled (the principal steam-electric plant at Muscle Shoals, also the steam plants at Tupelo and Amory), all such additional steam-electric plants as may in the sole discretion of TVA be constructed in establishing its system (See TVA Act, Section 15, 4 (j), Appendix) or by purchase from going utilities; and also all hydro-electric generating plants which may be constructed on the Tennessee, its head waters and tributaries, navigable and non-navigable, limited only by the water power potential in the streams (Findings Nos. 26, 27, 69, 90).

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[*] "34. At the time this power policy was adopted TVA had not formulated any program for use of nitrate plant or for national defense, or for the manufacture or method of disposing of fertilizer, or made any estimates to determine what was to be primary or requisite governmental use of power and what was to be a disposable commercial 'surplus.'"

[†] "90. TVA intends to interconnect all of its power installations when and as constructed and to operate the same as an integrated, interconnected and independent system, and is now constructing the Wilson-Wheeler-Norris line."

This entire development is, under the plan, to be an exclusive one (Finding 78,* II-1065). One of the first corporate actions of the TVA was the determination that federal power permits to any agency except TVA would be opposed (Minutes, June 26, 1933, II-531; and see II-532-3, 572-5). Small parcels of land in head-water flood-age areas were purchased by TVA and taken in the name of the United States to prevent development of power sites by upstream owners of dam sites by purchase or condemnation under state laws (Morgan, II-401-2).

This policy included not merely the matter of hydro-electric installation on the Tennessee and tributaries but the formal determination by TVA "to disapprove all governmental loans for the production of additional power **within the area of the Tennessee Valley,**"† and obviously contemplated that the program would result in no further hydro-electric development except by TVA.

Section 11 of the 1935 Amendment to the TVA Act (Appendix, p. 36) specifically subjects any future power project on the Tennessee River or any of its tributaries to approval by TVA.

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*"78. The TVA plan as conceived and in process of execution contemplates complete and exclusive control and jurisdiction over all power sites on the Tennessee River and tributaries."

†Minutes for Sept. 21, 1933, II-535 (538).

(e) The Amount of Electric Power Available to the TVA Program.

The electricity available by developing the capacity of the river and its head waters and tributaries included in the integral and exclusive plan of TVA, as estimated by the United States Engineers (House Document 328, 71st Cong., 2nd Sess., p. 92), is 3,500,000 to 4,000,000 firm h. p., or 25 billion KWH per annum (Eng. 31, II-1044). The market for power in the Tennessee basin for the year 1950, estimated by the United States Engineers (*ib.*, p. 88) is 5 billion 900 million KWH per annum. This market estimate, based on 1928 consumption, was estimated at the national rate of increase in electric power consumption prevailing prior to the depression years (1922-1928), or approximately 15% per annum. This increment of power was in addition to the power already produced by existing companies and fully serving the market requirements of the region.*

(f) The Installment-Sale Promotional Agency Established at Request of TVA.

At various points in the minutes of TVA the suggestion was made that additional authority be obtained from

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*See excerpt from TVA minutes for October 13, 1933:

"(a) That two major holding companies, the Commonwealth & Southern Corporation and the Electric Bond and Share Company, own a network of transmission lines and distribution systems, together with generating facilities within the area of operations of the Tennessee Valley Authority. In the scale of rates charged by these companies, these facilities are more than ample to meet existing effective demand for electric service and represent an investment of many millions of dollars. A substantial, and perhaps the major, part of the securities issued to finance these facilities are in the hands of the public.

"(b) The Tennessee Valley Authority has available about 105,000 kw. of firm power at Muscle Shoals and with the completion of Norris Dam this will be more than doubled. The existing demand is being adequately supplied by the privately owned utilities" (II-541). See also II-610.

Congress in order to enable the TVA to promote the marketing of electrical appliances (II-541, 544, 552, 553, 555; Finding 96, II-1070).

Without waiting for color of this authority, **at the request of TVA** (II-411) the President, by Executive Order dated December 19, 1933 (I-167), directed the organization of the Electric Home and Farm Authority (Fng. 97, II-1070), transferred to its treasury $1,000,000 under color of Sec. 220 of the National Industrial Recovery Act (Finding 98), and from the time of its organization under the laws of Delaware (the three directors of TVA acting as directors and executive officers of EHFA) the latter was proclaimed by TVA as its agency and functioned as an agency of TVA (Findings 99, 100; and See I-238, 248, 312, 313; II-410, 411, 513, 571, 630, 631, 677).

According to the budgets in evidence, TVA supplied it with additional working funds (II-410, 571), employed an advertising firm to plan its promotional campaign (II-671), paid or assumed directly a substantial part of its corporate expenses; and that agency circulated (franked through the United States mails) in excess of 660,000 highly colored promotional appeals for the installment purchase of electric appliances, stoves, refrigerators, washing machines, etc., in the area. See Findings Nos. 96 through 103.

Public announcement has recently been made that EHFA as a Delaware corporation is to be dissolved and that another EHFA has been incorporated as a corporation of the District of Columbia, to be operated separately from the TVA. Because of the ostensible separation of the corporation from domination by TVA and the transfer of its functions to the national field, this statement will not be further extended as to the bearing of that agency. It is significant as a functional agency wholly commercial and promotional in type, manned, publicized and in material part financed by TVA.

(g) The Facts Proven Show That the Proposed Operations by TVA Would Constitute a Monopoly in the Area Selected for Operation, Would Displace and Defeat the Jurisdiction of the State to Regulate Local Utilities and Directly Burden the Discharge by Public Utilities of Their Duty to Provide for Extensions and Increase of Facilities.

The proof forces the conclusion that no utility could compete with TVA electricity, at the rates established by it, whether distributed directly by TVA or through its controlled privies under the TVA program. This fact was tersely stated in the report of the Electric Power Board of Review of the Public Works Administration, approved by the latter in making the allotment of federal funds for the financing by the government of a system to distribute TVA electricity in competition with the Power Company in Decatur, Alabama,* at the sole risk and cost of the government, and without pecuniary liability on the City of Decatur (II-685). This report (II-687) found that the rates to be offered by the competitive system would be so much lower than the rates which the Alabama Power Company (regulated by the Alabama Public Service Commission on a policy of state-wide uniformity)† could offer, that the Power Company could not possibly meet the competition, and that accordingly, during the first year of operation of the competitive system "will have at least 75% of the business measured in dollars, and an increase of not less than 10% in each succeeding year." (II-689.)

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*It was stipulated that the PWA resolutions as to Decatur were typical of the allotments to other defendant towns (II-686).

†See excerpt from orders of Alabama Commission establishing the State's public policy (II-701-2).

As stated by Lilienthal, the proposed competing systems using TVA power and rates would, in his opinion, get 100% of the business, rendering "valueless the lines, poles, transformers, etc., which are now owned by the Alabama Power Company." TVA release, July 6, 1934, II-643 (644). The identical answers of the defendant municipalities assert that "unless said Power Company shall sell its properties such properties will have a wreckage value only" (I-347, 352, 357).

In short, complete exhaustion of the utility in less than four years was accepted as sufficiently certain to justify an investment by the government of $350,000 in a duplicate, competitive electric system at Decatur (II-686) and the following announced allotments at other principal towns in the service area, not including rural projects and other direct competition by TVA:

Florence*	**$ 436,000**	**(Population 11,729)**
Guntersville	**87,272**	**" 2,826**
Hartselle	**60,000**	**" 2,204**
Russellville	**125,454**	**" 3,146**
Sheffield	**230,000**	**" 6,221**
Tuscumbia	**130,000**	**" 4,533**
Bessemer	**1,238,182)**	**In Birmingham metropolitan area, population about 300,000.**
Tarrant City	**329,091)**	
Decatur, supra	**350,000**	**(Population 15,593)**

***While the Power Company's fixed franchises within the City limits of Florence, Sheffield and Tuscumbia have expired, the franchises are intact throughout the suburban areas and the surrounding county; and the Power Company's distribution systems are now supplying those communities, paying licenses and taxes, at the rates established for the Power Company by the Alabama Public Service Commission. The PWA allotment provides for no power generating system. The towns are now actual customers, and, as distributors, would be potential customers of Alabama Power Company but for the proposed commercial manufacture and sale of electricity offered by TVA and its interference by means of the proposed contracts for federal investment, sale of power and control of rates and operations by the government.**

The rates already in effect by the Alabama Power Company have been characterized on this record by TVA as reasonable, and as therefore warranting the extension by TVA of its promotion of installment sales electric appliances to Alabama Power Company customers through its agency, the EHFA (II-513). The contract of January 4, 1934, contained an agreement by the Tennessee Electric Power Company with TVA that the former would introduce generally throughout its system in Tennessee the schedule of rates specified in Section 17 of the contract (I-147), which were shown by the evidence to be substantially the rates in effect with the Alabama Power Company (II-478).* There were no proceedings pending before the Alabama Public Service Commission for reduction in the rate schedules of Alabama Power Company (Fng. 95, II-1069).

There can be no dispute on this record that the utility activities of TVA will constitute a necessary monopoly of utility service in any area undertaken by TVA. The contract of January 4, 1935, affirmatively committed the contracting power companies to withdrawal and discontinuance of service (Section 7, I-139).

Extension of the TVA program into any area not only monopolizes the service but directly and necessarily displaces state jurisdiction and control over utility service and freezes and defeats the right and continuing legislative duty of the State to determine, from time to time, its utility policy (whether conforming to the New York State policy† adopted in Section 11 of the TVA Act or not).

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*The TVA rate schedules appear at II, 1206-1209, 1229-1232.

†See Sec. 5 (5) of Chap. 722, Laws of New York (Approved Apr. 27, 1931), providing that the St. Lawrence project "shall be considered primarily as for the benefit of the people of this state as a whole and particularly the domestic and rural consumers * * *."

By introducing TVA rates in any area, there results a necessary departure from the principle of state-wide uniformity which constitutes the existing policy of the State of Alabama (supra, p. 34; II-701-2).

Although, in theory, a local utility distributor selected by TVA (where distribution is not directly undertaken by TVA and wholly removed from State jurisdiction) may remain subject to regulation under the continuing police power of the State, which theoretically it may not surrender (Oppenheim v. City of Florence, 229 Ala. 50, 155 So. 859), this control reserved to the State is without effect under the TVA procedure. The Federal Government (TVA or PWA, etc.) supplies the entire investment, takes a lien or right of specific performance, and TVA supplies the current under contract which it may terminate, without liability or control or recourse by the State or its citizens, if the distributor does not comply with TVA contract requirements as to rates, service regulations, accounts, disposition of revenue, and other vital characteristics of utility control.

There is, moreover, direct interference with the jurisdiction of the State and the ability of its state-regulated electric utilities to respond to the public service and comply with their public undertakings, in that with the TVA program of indefinite, uncharted, unknown extension at the arbitrary will of TVA, as now administered and under execution, it is not possible for existing utilities in reach of its encroachments to plan efficiently and economically for extensions, power supply or service (Thurlow, II-1021). See infra p. 67.

5. PRINCIPAL OVERT ACTS IN FURTHERANCE OF TVA INTEGRAL PROGRAM.

The overt acts shown by the record in furtherance of the integral program and directly affecting the Power Company, may be classified as follows:

(a) **The Announced Program as a Whole, and Its Direct Threat of Competition With the Power Company.**

The facts stated above sufficiently outline the program, its commercial utility characteristics, its inclusion of the entire Alabama Power Company service area (See Map "A"), the assurance that it will take the market wherever it proposes to compete, the means by which the Government, in the guise of TVA or PWA, makes use of municipalities without funds, credit or investment or assumption of pecuniary liability as agencies for the extension of TVA yardstick functions and retailing of TVA power. It is included in this bracket of the statement because constituting a horizontal threat of competition and direct injury, in addition to the specific means and details scheduled below. The contention here is that the corporation had the right to resist its progressive annihilation by this program; that to yield was a breach of duty authorizing the stockholders' suit and that protection from this phase of the integral program is directly and necessarily related to relief from the specific acts stated below.

It was averred, and the District Court held, that this program, commercial, utility and permanent in type, nongovernmental in function, was in violation of the Constitution.

(b) The Contract of January 4, 1934 (Transmission, and Rural and Urban Distribution Systems).

In furtherance of direct utility operations by TVA, the latter obtained execution by Alabama Power Company, without previous consideration by its Board of Directors (Finding No. 11, II-1037) of the contract dated January 4, 1934,* negotiated by Commonwealth & Southern Corporation, a holding company which controlled the Alabama Company and other utilities which executed the contract (Findings Nos. 10, 11, II-1037).

By that contract Alabama Power Company proposed to abandon to TVA the service of five entire and two fractional counties in North Alabama (Finding No. 14, II-1038) from which it derives a gross annual revenue of $750,000 (Finding No. 25) and in which it holds certificates of convenience and necessity (Findings Nos. 23, 24; II-1041); contemplated the transfer of designated transmission lines and certain urban and rural distribution systems (described in Finding No. 77, II-1062) of the Power Company in the area, for direct commercial utility operation by TVA as a going business, and left the Power Company's remaining seventeen urban distribution systems in the ceded area without a permanent source of power and subject to the practical necessity of sale at any price bid by TVA or its privies [Findings 13, 80(c), II-1037, 1066]. Should the Company after expiration of the truce attempt to operate the urban systems in competition with TVA or its controlled privies, it would as a utility have to obtain anew certificates of convenience and necessity from the Alabama Public Service Commission (Code of Ala., 1923, Sec. 9795) [Finding 77(d), II-1064], and construct new transmission lines to replace those proposed to be taken over by TVA.

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*Exhibit No. 5 to the Bill, I-133; the exhibits to this contract are described at II-680.

This same contract protected the Georgia Power Company, another subsidiary of Commonwealth & Southern, from any loss of service area or franchises and from encroachments, for the period of the truce, without cost or sacrifice on part of Georgia Power Company. The Alabama Power Company had no investment or interest in the Georgia Company (II-479).

The contract proposed payment by TVA of a consideration amounting to approximately 60% of the stipulated replacement value (**value**, not cost) of the property to be conveyed.*

The lines proposed to be purchased by TVA under the contract of January 4, 1934, were for the sole purpose, known to both vendor and vendee, of operating a commercial electric distribution business (Contract, Sec. 4, I-137), wholesale and retail, wholly non-governmental in character (Finding 89, II-1068, Supra, p. 27). It was this purpose which was held by the District Court to be beyond the lawful functions of the Federal Government, directly and necessarily intending and accomplishing a violation of the Tenth Amendment.

This yielding by the Alabama Power Company to a result contrary to the fundamental public policy of the nation was averred, and was held by the District Court to constitute, a breach of duty to the corporation, without

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***For some reason it appears that TVA desired the public to know that the replacement value of the items was much greater than the price paid. The exhibits to the contracts of January 4 and August 9, 1934 stipulated the recent replacement value of the respective items. The total of these items was $3,477,623 and the purchase price was $2,150,000.00, about sixty-two per cent of the replacement value (See I-156, 162; II-681).**

The official release of the Tennessee Valley Authority admitted that no intangible values were allowed (II-620; and see testimony of Lilienthal before House Military Affairs Committee, March 29, 1935).

reference to any question of good faith or to the question of fraudulent or improper intent on part of the Power Company's board of directors, ~~or~~ the question of duress or other compulsion authorizing the corporation to disaffirm the contract.

(c) Compulsion and Abuse of Power.

In addition to the basic illegality of the contract and the yielding to an integral unconstitutional program that assured immediate partial abandonment of franchises and threatened progressive destruction of the entire system, averred as justifying the stockholders' suit and disaffirmance of the contract by the corporation, the contract was averred to have been executed under conditions amounting to actionable administrative malevolence and commercial compulsion on part of the government (TVA and PWA), involving an abuse of federal power; including systematic and inflammatory propaganda by the TVA and by the defendant TVA directors* and by threat of free use of federal funds (averred to be an abuse of lawful power and *per se* a threat to use unlawful means) with which to construct or finance and control competitive systems and invade the Power Company's territory, should the corporation not yield to the TVA terms. It was sufficiently averred (I-33-36, 46, 59-62) and is here maintained that the record shows that the pressure was sufficient to overcome the duty of the Board of Directors to resist.

Inasmuch as the invalidity of the contract in furtherance of a known purpose to violate the Constitution is contended by petitioners to be sufficient ground for annulment at the instance either of the Power Company or its stockholders, the further circumstances of compulsion shown by the record need not here be set forth other than to refer to the express finding of PWA (Electric Power Board of Review) and the public release of TVA (Lilienthal) to the effect that a competing system financed by the Government and supplied with TVA power would take 100% of the market in competition with the Power Company (II-687-8; II-644). See Findings 80 (II-1065) and 109 (II-1074). See also II-564; answer of Alabama Power Company, Sec. 20, I-305; answers of defendant municipalities, I-347, 352, 357; Recitals in draft of agreement to sell urban systems, II-518; letter from Willkie, II-514.

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*Excerpts from official TVA press releases, II-580-656, and brief excerpts in Exhibits 4, 7, 9 and 11 to the bill, I-111, 165, 170, 187. See in particular, Exhibit 7, I-165.

Also the telegram of Public Works Administrator Ickes:

> "This Administration will advance no funds to Florence for expenditures inconsistent TVA plan,"

and advising, in effect, that the PWA allotment would be held over the head of the Power Company until the latter agreed with TVA to sell its urban distribution systems (I-60; II-692). Precisely the same threat of sale or disaster was held over the Tennessee Public Service Company (Lilienthal: II-646).

(d) **The Option-Agreement of August 9, 1934.**
(Seventeen Urban Distribution Systems.)

Under date August 9, 1934, TVA obtained execution of a contract for the transfer by the Power Company to TVA of the former's seventeen urban distribution systems (serving within and adjacent to the defendant towns) which had been left unprotected and undisposed of by the earlier (January 4, 1934) agreement.

This option-contract of August 9, 1934, was obtained by TVA under the same circumstances* as the basic agreement of January 4, 1934, viz: threats of competitive duplication by the towns (See telegrams of Lilienthal, dated June 20, 23, and July 7, 1934, II-515-18; Finding No. 12, II-1037; I-60; II-692, 646), to be financed wholly by the government (TVA or PWA) by means of no-recourse revenue-investments and to be operated by the towns under control of and contract with TVA (II-550, 658-60, 1202).

For the type of inflammatory appeal employed and given public release for press distribution, see official TVA release text of the address delivered by Lilienthal following the above telegram, delivered at Jackson, Tennessee, on June 22, 1934 (II-639). Six days following this attack Commonwealth & Southern (Willkie) consented to give the option (II-516). The draft of the option submitted by Willkie sufficiently indicated that the threat of competitive duplication under combination of federal investment to distribute federal power was the procuring cause (II-518).

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*The circumstances were stated by the District Court as follows (Fng. 80 (c), II-1066):

"The contract of August 9 between Alabama Power Company and TVA, calling for the transfer to the latter of fourteen urban distribution systems, was outstanding at the time suit was instituted, notice of termination by TVA having been served on Alabama Power Company on January 24, 1935.

"This transfer of its fourteen urban systems by Alabama Power Company was implicit in the agreement of January 4, 1934. While reserved from the transmission systems and rural distribution systems definitely to be conveyed by the contract of January 4, 1934, Section 5 of the agreement of January 4 (Exhibit No. 5 to the Bill of Complaint) provided that Alabama Power Company shall convey the reserved distribution systems listed in Exhibit "B" to the respective municipalities when the Power Company had agreed with the municipalities on the price. The Power Company covenanted to try to reach an agreement, TVA assisting. If the reserved systems should not be sold to the respective municipalities within three months, TVA reserved the right to serve such municipalities direct. Loans from PWA had either been allotted or were potentially available."

(e) Investment and Participation in Competitive Electric Systems by the Government Under Government Control.

TVA elected to exercise the option of August 9, 1934, but before the transfer was consummated this suit was filed. Under a right reserved in the option, and shortly before the final hearing herein, TVA cancelled the option (II-706) and forthwith brought about renewal of the offer of government financed systems to distribute TVA power under the TVA Control contract (Finding 82,* II-1067). This offer was made to the principal municipalities in the area, included among the defendants herein (II-663). These proposals were interrupted by the final decree in so far as the so-called loans were proposed as a means to further the proprietary distribution and sale within the towns, in competition with the Power Company, of TVA power.

(f) The Relationship of the Government to Municipal Electric Systems Being Financed by It in Alabama.

Section 216 of the Constitution of Alabama prohibits municipalities from incurring indebtedness in excess of stipulated percentages of the assessed value of property in the municipality. By reason of overspending in the past and recession of tax values, municipalities generally in Alabama (including the defendant municipalities) stand indebted in excess of their constitutional limit and cannot at this time incur any new pecuniary obligations.

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*"82. When there was delay in transferring the properties TVA rescinded and at or immediately before rescission effectively used its efforts to expedite the PWA loans to the respective towns."

The principal municipal defendants are either in receivership in the District Court or facing that status. None of them has any resources adequate to pay their current governmental expenses and make investments in electric systems (Finding 81,* II-1067), or set up capital for constant extensions of plant within the scope of the undertaking.

None of the defendant towns propose to attempt to issue general credit bonds or to incur pecuniary liability in connection with any such undertaking.

The device of revenue bonds or vendor's liens by which properties are conveyed to municipalities in Alabama by instruments under which the grantor looks solely to a lien upon or to the revenue from the property, and not to any pecuniary obligation or liability of the municipality, have been approved by the Supreme Court of Alabama as not in violation of the Alabama Constitution, where the arrangement in fact expressly disclaims any pecuniary obligation or liability on part of the municipality.† All of the financial aids proposed by TVA or the PWA or any other agency of the government, or which could be proposed under Section 7 of the Amendment to the TVA Act, purporting to authorize TVA to extend credit out of the additional $50,000,000 fund provided by that Section must, in so far as Alabama municipalities are concerned, be on the basis stated, without investment, risk or pecuniary obligation on part of the municipality.

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*"81. It is a matter of judicial notice in the area of this judicial division that the municipalities in question are in a serious financial situation, due to the shrinkage in revenues from recession in advalorem tax values and because of the high ratio of municipal indebtedness to property values and revenue. Two of the towns, Florence and Tuscumbia, are in receivership in this Court. Receivership proceedings by general creditor's bill is pending against the City of Decatur. It is a matter of common knowledge that the towns have no resources with which to pay in cash or make substantial payment in cash for electric distribution systems. The transmission lines covered by the contract of January 4th are the only existing means of serving the fourteen towns."

†Oppenheim v. City of Florence, 229 Alabama 50, 155 So. 859 (1934).

If the municipality has any equity in the project, the subjection of that equity to a lien as a basis for revenue bonds is held to be violative of the Constitutional provision; that is, to constitute an indebtedness of the town, and is therefore invalid where the debt limit has been exceeded.*

All of the so-called loans which had been allotted at the time of the final decree, all of the allotments to municipalities for competitive systems which have been made since the final decree, must necessarily be on the revenue or no recourse basis.

In short, any participation by the federal government in establishing competitive utility systems in municipalities in Alabama must be a case in which the government is at the outset the sole beneficial owner of the project, in which the municipality has no investment, no equity, and incurs no liability.

The operation of the property is solely at the risk and for account of the government.

In addition, TVA has adopted the fixed policy of requiring municipalities distributing TVA power to conform to the schedule of rates, service regulations, accounting, and the disposition of revenue and reserves dictated and controlled, throughout the life of the supply contract, by TVA (Finding 88, II-1068; TVA minutes, II-548).

It is a fact that this domination and control by TVA is necessary to give effect to its function as a federal competitive yardstick in the area. If the municipalities were left to determine their own rate structures, they would under the facts of this record have the right to make such charges as their fiscal exigencies might dictate, set up a variety of rate structures throughout the region, or emphasize upon low industrial rates, rather than low farmer and domestic rates enjoined by the federal policy (Section 11), bring about discriminations as between consumers in competitive or identical situations (this discrimination is in fact being accomplished in Alabama by the introduction of TVA service and rates) and might thus defeat the yardstick program of TVA.

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*In re Opinions of the Justices, 226 Alabama 570, 148 So. 111.

It is a fact, as disclosed by this record, that any and all so-called municipal systems proposed to be constructed by the Government in Alabama under the circumstances above stated for distribution of TVA power, although in the guise of loans, are in fact investments by the Government, are controlled and directed by the Government, in which the Government is the sole original beneficial owner and that the operation of the systems under covenant with the Government constitutes operation by or participation in by the Government. The Tennessee Valley Authority has by its minutes (October 13, 1933, II-543) recognized its control of rates as participation in the function of distribution to the consumer. This participation is in addition to the investment of the Government of the entire amount necessary to construct the system.

At the time of the final decree the plaintiffs and the Power Company were confronted with the integral TVA plan in its entirety, with the certainty of region-wide competition from TVA, and with these specific facts and threats:

1. The contract of January 4, 1934, calling for transfer by the Power Company to TVA of all the transmission lines

and certain rural and small urban distribution systems, as a going business;

2. Federal investments in the form of revenue "loans" for the entire cost of competitive systems for retailing TVA power in the principal towns (and like action contemplated by all seventeen towns), under government control as stated.

3. The certainty of indefinite competitive extension by TVA in order to extend its market for power as rapidly as new steam or hydro-electric plants should be completed and as announced in its power program; also in order to comply with the requirement of "equitable" distribution within transmission distance required by Section 11 of the TVA Act.

When the bill was filed the Power Company was, therefore, affirmatively a party to a contract (January 4, 1934) contemplating direct and necessary violation of the Constitution, executed under circumstances of compulsion as the alternative to competitive destruction of its properties; and was also yielding to a progressive program of competitive destruction which both before final decree (in the case of the defendant towns) and after final decree (as publicly announced by the Government in the case of electric systems in the Birmingham District and elsewhere) has assured direct competition of TVA power for the Power Company's existing customers and market.

g. The Various Types and Sources of Power in the TVA Commercial Electric Business.

Because of the consistent determination of TVA to justify the entire program as an incident to navigation, petitioners have been able at no time to elicit from counsel for TVA any defense or justification of the commercial operation and marketing of electricity from the steam plants at Muscle Shoals, Tupelo, Amory, etc., or potential in the direct authority of Section 15 of the TVA Act to purchase up to $50,000,000 in additional steam plants; or the purchase and sale of power manufactured by others as a basis for commercial competition in state domain. Nor did the opinion of the Circuit Court of Appeals deal with those matters, ignoring the commercial operation of the steam electric plant at Muscle Shoals which, in fact, has a prime capacity of 60,000 kw as compared with 50,000 kw at Wilson Dam (II-991, 1049, 833, 542, 440).

The Norris resolutions of 1928 and 1931 (S. J. R. 46 and 49), not approved or vetoed by Presidents Coolidge and Hoover, both instructed the Secretary of War to complete Steam Plant No. 2 in connection with the commercial operations authorized by those resolutions (Appendix pp. 49-E, 61). The TVA Act (Sec.16) directs its Board to complete the Steam Electric Plant No. 2 by installing the additional power unit in the steam plant "whenever the President deems it advisable." There is accordingly interconnected in the TVA commercial electric system not merely the 60,000 kw steam units already installed, but the additional 300,000 kw unit for which the intake has been provided, which was made obligatory under S. 46 and 49 and only awaits the approval by the President under the TVA Act.* Hence the commercial distribution of electricity from this steam plant is not only available in large volume from the existing unit, but is authorized to be increased by 50% at any time.

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*The design looking to the installation of the additional 30,000 kw. unit is described in Muscle Shoals Propositions, House Military Affairs Committee Hearings, 67th Cong., 2d Sess. (1922).

No finding of fact or conclusion of law was requested by TVA in defense of the function of commercial manufacture and distribution of electricity from the steam plants (see rejected findings requested by TVA, II-1102); nor as petitioners can construe the position was it sought to be justified by any subdivision of the brief or argument for TVA before the Circuit Court of Appeals.

The District Court made specific findings and conclusions as to the matter, holding on the facts that permanent commercial operation of the steam plant, as well as of the hydro-plants, had no lawful relation to any power of the government (Findings 106, II-1072; 118, II-1079; Concl. 5, 6, II-1092).

The important constitutional question of the right of the government to utilize a plant, acquired ostensibly for a constitutional purpose, in conducting its business in generating, transmitting and distributing electric energy and in manufacturing, selling and distributing fertilizer and fertilizer ingredients after the constitutional purpose is spent or while it is dormant, was directly and necessarily considered and decided by the District Court as to the electric program and was ignored by the Circuit Court of Appeals. The entire reliance of TVA on argument below and the conclusion of the Circuit Court of Appeals was predicated solely on the supposed right of the government to appropriate the surplus waters not necessary to be held or manipulated for regulation of navigation as the basis for the permanent business, commercial manufacture and utility transmission and distribution of electricity.

There has, however, up to this time been no formal admission by TVA that the commercial operation of the steam plant at Muscle Shoals is a violation of federal function.

In order, accordingly, that the several commercial manufacturing and merchandizing processes entering into the TVA program and into the contract of January 4 and the other specific acts complained of may be adequately dealt with in the argument on the facts, it is necessary to summarize here the facts as to the sources and types of power being used and proposed to be used by TVA to form its interconnected pool of commercial power as the basis for its region-wide utility network.

1. Inland steam or Diesel plants purchased by TVA.

TVA has purchased from Mississippi Power Company steam and Diesel plants in North Mississippi. (I-134, II-680). These were relatively small commercial units in the utility system of the Mississippi Power Company, used latterly as stand-by plants, have never had any relation to navigation or war; did not constitute government property until purchased by TVA for the purpose of utility operation; were integral parts of the Mississippi system which was taken over by TVA as a going business (Findings 75, 84-86*, II-1062-1068).

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*"75. At the time suit was filed the northeast Mississippi properties acquired from Mississippi Power Company under the contract of January 4, 1934, were being operated by TVA and rural lines were in process of extension by TVA in Mississippi and Alabama."

"84. The utility properties taken over by TVA from the Mississippi Power Company were at the time of the filing of the bill being operated in their entirety directly by TVA or by organizations promoted by TVA to take over the retailing, under TVA contracts as above stated.

"85. The evidence shows that all forms of utility service were involved in the Mississippi operations taken over or contracted for by TVA, including that of sales promotion.

"86. The Court finds that said properties were not purchased for any Governmental use."

The record presents for decision the contention of the petitioners that the utilization of these plants for the commercial manufacture of electricity is wholly unrelated to any federal function, and that federal competition with the Alabama Power Company making use of these plants is illegal.

Sections 4 and 15 of the TVA Act appear on this record to have been interpreted by TVA as authorizing TVA to establish or acquire power plants of any type, whether steam-electric or hydro-electric. Section 4 (j) of the original Act provided that TVA:

> Shall have power to construct dams, reservoirs, power houses, power structures, transmission lines, navigation projects, and incidental works in the Tennessee River and its tributaries, and to unite the various power installations into one or more systems by transmission lines.

The 1935 amendment (Sec. 2) added the power to "acquire or" construct power houses, power structures, etc.

Section 7 of the Amendment, approved August 31, 1935 (Appendix), in express terms contemplates the participation by TVA in the acquisition of going utility systems, including steam or other power plants out of the additional $50,000,000 as to which TVA is given carte blanche by the Amendment. The question whether the government (TVA) may make use of such manufacturing plants thus purchased for ordinary commercial competition with existing utilities in state domain is included among the issues directly presented for decision.

2. **Electric Power Purchased by TVA for resale.**

At the time this suit was filed, TVA held a series of contracts with power companies for the purchase of power (for resale by TVA in its utility system). This power was generated by the contracting companies, and had no relation to navigation or any federal function. Among the contracts of this character outstanding at the time of this suit was the contract with Carolina Power and Light Company (II-569), the contracts of January 4, 1934, with Alabama Power Company, Tennessee Electric Power Company and with Mississippi Power Company (I-141; sections 10, 11).

The question is accordingly presented for decision or declaratory action on this record whether it is a lawful function of the federal government (TVA) to purchase power in the market for commercial transmission and sale throughout state domain in competition with and necessarily contributing to the eventual exhaustion of existing public service companies in the competitive area selected for its operations by TVA.

The question here presented is cognate with the purchase of fertilizer under section 5 (a) manufactured by others for retail distribution in its merchandising program, in the Tennessee Basin, or, indeed, anywhere. See TVA photograph of Montana cornfield suffering from erosion (II-876).

3. **Steam Plant No. 2 at Muscle Shoals.**

The finding of the District Court is that all TVA power is to be interconnected into the system pool (Finding No. 90, II-1068), and this plant was included in the TVA witness Thomas' set up of the TVA pool of power (II-991), and is included in the available power as estimated in the TVA minutes (II-542). And see references in argument.

Section 11 of the act is a mandate to TVA to distribute throughout transmission distance the electricity manufactured at the Muscle Shoals steam plant, as well as that manufactured at the hydro-electric generators in Wilson Dam.

This Muscle Shoals steam plant was, technically, not constructed under color of Section 124 of the National Defense Act of 1916 as has been stated by TVA. In November, 1917, the President allotted $200,000 out of the $20,000,000 appropriated by Section 124 for the purpose of purchasing a site for the second nitrate plant, and on March 18, 1918, an additional $150,000 was allotted for the purchase of a site for another nitrate plant. These allocations were revoked, however, on March 13, 1919, before any of the money was spent. Thereupon the cost of the project was paid from appropriations for armament of fortifications, acquisition of the site having been authorized under the Act of April 11, 1918 (40 Stat. 518, Appendix p. 42).

The history of the construction of this plant is contained in the testimony of Col. J. W. Joyes in "Muscle Shoals Propositions; Hearings, Committee on Military Affairs, House, Sixty-Seventh Cong., 2nd Sess., Feb. and March, 1922" (P. 1050-1057).

Col. Joyes, who was chief of the Nitrates Division of the Ordnance Office at the time of the construction of the plant (ib. 1039), stated that nitrate plant No. 2 "had no connection whatever" with Sec. 124 of the National Defense Act (ib. 1053). The plant was begun solely for the production of explosives in a war emergency, so far as the War Department is concerned.

4. The commercial hydro-electric generators in navigation or other dams.

The generating units of this type involved on this hearing are:

(a) The eight turbo-generators installed on eighteen emplacements in Wilson Dam (Section 16 of the TVA Act directs installation of ten additional generators on approval by the President);

(b) One generator being installed on eight emplacements in Wheeler Dam (II-836, 847);*

(c) Two generators being installed in Norris Dam;

(d) All generators which may be installed on the ten remaining emplacements at Wilson, the seven remaining emplacements at Wheeler, the six emplacements provided in Pickwick Dam, under construction, and such generators as may be installed in any and all additional dams to be constructed by the government or TVA.

Current provision has been made for the beginning of construction by TVA of the following additional dams by the Second Deficiency Appropriation Act of 1935 (Pub. No. 260, 74th Cong., approved Aug. 12, 1935): Guntersville, Alabama† (Tennessee River); Chickamauga, Tennessee (Tennessee River); Fowlers Bend, Tennessee (Hiwassee River); and for "investigation as to the location and desirability" of two other dams.

None of the existing or proposed hydro-electric units has any physical or functional relation to navigation. At each navigation dam at which any water head is developed, a small water wheel installed at nominal cost would provide all the power necessary to actuate the locks and serve the navigation improvement. A small gas or Diesel engine would serve the same purpose, independently of the water power. A 750 KW unit at Wilson Dam, entirely independent of the eight commercial turbo-generators, has been long since installed and is adequate to service the locks and all purposes related to navigation (Finding No. 105, II-1072). A like provision is being made for service of the locks at Wheeler Dam (ib.).

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*On Nov. 18, 1935 the Associated Press carried announcement by TVA that an additional 45,000 horsepower turbine and generator for Wheeler Dam had been contracted for and would be installed in 1936.

†Beginning of construction announced by TVA in press, Nov. 26, 1935.

6. FACTS AS TO THE ABSENCE OF ANY FACTUAL RELATION BETWEEN TVA COMMERCIAL PROGRAM AND ANY CONSTITUTIONAL FUNCTION, AND ITS INCONSISTENCY WITH THE LETTER AND SPIRIT OF THE CONSTITUTION.

1) There was no testimony to sustain any claim of relationship between **commercial operation** of the Muscle Shoals steam electric plant or any of the hydro-electric plants or commercial distribution and sale of electricity and any military purpose of the government whatever (Finding 106*, II-1072). The proof showed, and the District Court found substantially that, regarded as standby plants, it was not necessary that they be operated in order to maintain or hold them in readiness for putative war use or in case of some unknown future bona fide federal requirement (Finding No. 43, II-1048). On the contrary, it

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*"106. The Court finds that there is no physical or functional relation between the installation or non-installation of hydro-electric units (or the generation of energy thereat) in intentional excess of any capacity required for actuation of locks and dams and related purposes in or as a part of navigation dams and the regulation of navigation. The commercial sale of power in time of peace to industries or to the public not engaging or proposing to engage in some process relating to national defense or Governmental use has no relation to and is not in furtherance of national defense or other Governmental use or function as shown on this record."

is obvious on this record that the commitment of the plants to commercial operations, bound by long term contracts, to that extent was inconsistent with and a hindrance to any latent or prospective war use of the plant.

2) Since the TVA program contemplated, as found by the District Court (Findings 26 and 28, II-1042-3), that the business established by it should in all respects be comparable with an independent competitive utility system, assuring continuous service to the full extent of the demand of the general public in all areas served by TVA power, it is certain from the record that the capacity of the steam and hydro plants thus devoted to utility service would not in fact be responsive to recapture or diversion for specific military use.

3) Under Section 20 of the Act, the right to recapture the capacity was made subject to the necessity for compensating contract holders. This is in no substantial sense different from the right of the United States to take over the operation of any electric plant or rights under any assignable electric supply contract for military purposes. (See Sec. 16, Federal Water Power Act, June 16, 1920, 41 Stat. 1072, 16 U. S. C. 809; International Paper Co. v. United States, 282 U. S. 399).

(a) Facts as to Lack of Relation to Regulation of Navigation.

The District Court found directly that there was no relation between the commercial operation of the steam plants and hydro-electric plants and the regulation of navigation or other federal power (Findings 86, 104, 106, 118).*

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*"104. The operation of a commercial utility service by TVA and the wholesaling and retailing by TVA of electricity in the area served by the Alabama Power Company is not and will not be in aid of the regulation

The record shows, as is obvious, that navigation would remain unaffected whether the steam plant were operated or not, or whether turbo-generators were installed in the navigation dams or not. (Morgan, II-406-7).

1. The utilization of waters to create electricity is not coincident or identical with manipulation of waters in regulation of navigation.

It was proven on this record that the amount of water necessary to actuate the locks for navigation was a nominal fraction of the low water flow of the river (II-449-50, 675).

The principal storage (flood control) dam contemplated in the TVA series is Norris. By manipulation of the pool level the downstream dams are capable of being used to some extent for flood control; but it was proven on the record that flood stages on the river (involving necessity of manipulation of waters for flood control) exist for not exceeding one or two per cent (II-450) of the hours of the year, in the present condition of the river system.

It was shown that the interests of navigation would require some withholding and release of waters in and from storage because of low water stages at times to be anticipated until the nine foot navigation level is completed throughout the navigable stretch of the river, from Knoxville to Paducah; after that none at all.

Making allowance for all known requirements of navigation, the record showed conclusively that there could

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of navigation or national defense or other Governmental function in so far as any plan, purpose or activity of the TVA or of the United States disclosed on this record would indicate."

"118. The Court finds that there is no relation shown on the record between navigation, or erosion, or fertilizer production, or national defense on the one hand, and commercial and proprietary sale of power committed, produced, set apart and sold to the public by TVA at wholesale or retail on the other."

be no possible manipulation of the waters of the Tennessee **in the regulation of navigation** that would extend over a minor fraction of the time, and that accordingly the proprietary utilization of the waters of the river by the United States at other times could not possibly be referable to any bona fide regulation of navigation or to the dispatching of the waters in the regulation of navigation.

On the contrary, the proof showed that there was an inconsistency in use between the function of power production and navigation that makes it necessary that the government should reserve control over the pool levels, not in order to develop power, but in order that the interest of power production may not conflict with the regulation of navigation.

The provisions of the Federal Water Power Act of 1920 require that licensees shall at all times be subject to control by the government **in the interest of navigation,*** a provision which, as testified by Col. Edgerton, a past Chief Engineer for the Federal Water Power Commission and now on the staff of the Chief of Engineers, a witness called by TVA, had been proven to be "absolute"; that he was in charge of the river and harbor section in the War Department and that he had encountered no problem in exercising control for navigation where licensees are permitted to operate dams for power (II-826).

The facts disclosed on the record show conclusively that the use of the waters of the Tennessee for power are not coincident in time, except by accident, or in volume, with the dispatching of the waters of the river for navigation (Including in that term flood control).

Section 17 of the TVA Act requires the Cove Creek storage and power dam to be so designed "that the maximum amount of primary power may be developed at Dam No. 2

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*41 Stat. 1063, Sections 10, 11, 18; 16 U. S. C. 803, 804, 811.

(Wilson) and at any and all other dams below the said Cove Creek dam."†

Under this provision Cove Creek has been designed without locks and was shown on this record to be an indubitable impediment to the transit of commerce (II-454).

The antagonism between the production of power for commercial sale and the manipulation of waters for navigation is a matter of common and judicial knowledge. It has been publicly attested by Senator Norris, chief advocate of the power of the federal government to engage in commercial utility operation. Referring to Cove Creek as both a power and flood control dam, he stated in the Senate (69th Cong. Rec. Pt. 3, p. 3441):*

> "Suppose I as an individual take that (Cove Creek) for power, not caring anything about navigation. * * * Let us see how I would operate. I would let out as near as I could a continuous flow, **so as to give me as much primary power as possible** * * *. The result would be that I would be letting it out when, if I were considering flood control, I ought to hold it back; * * * when, if I were considering navigation, I would hold it back."

The words emphasized in the above quotation are substantially the words which were written by Senator Norris in Section 15 of S. J. Res. 46 and 49, and in Section 17 of the TVA Act, which have resulted in a lockless dam and primarily a power dam at Norris.

It is a self-evident fact that any agency which has committed itself to a permanent, actionable contract to supply power from Cove Creek would be interested in keeping the storage filled, whereas flood control would dictate that it be kept empty.

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†This provision making mandatory a dam designed for power production, has been in the measure since adoption of the first of the series in 1928 (Sec. 15, S. J. Res. 46, 70th Cong., 1st Sess., and S. J. Res. 49, 71st Cong., 2nd Sess. Appendix).

*"Compilation and Analysis of Congressional Debates on the Right of the Federal Government to Operate Electric Power Projects and on Related Subjects," by Bolling R. Powell, Jr.—1935, p. 346. This work contains an excellent historical introduction to the material dealt with. It is hereafter cited by abbreviated title.

After the completion of the dams in the series there is no necessity of any storage whatever for the purpose of overcoming low stages for navigation proper, hence under the TVA plan there will, in perpetuity, exist a physical inconsistency and conflict between the interest of TVA as a commercial utility proprietor and the Constitutional function of navigation. This conflict in dominant control has never existed under the Federal Water Power Act or where third parties are licensed to operate power plants under the combined consent of the state and federal governments. The interest of navigation and flood control reposed in the corps of engineers, has been the paramount concern of the War Department.

TVA made formal request upon the District Court to make this finding of fact, which is set out on page 1132:

> "XIX. The Use of the water in the reservoirs upon the Tennessee River and its tributaries for the generation of Power frequently conflicts with the use of the same water for navigation and flood control purposes."

The Court made this finding, p. 1081:

> "128. The use of water in the reservoirs upon the Tennessee River and its tributaries for the generation of power or flood control may conflict with the use of that same water for navigation and vice versa, according to control exercised or reserved over the several functions."

Bowman, Chief hydraulic engineer and witness for TVA, testified as to the inconsistency stated (II-837, 838); as did Sargent, a witness for TVA, who stated (II-812): "In actual operation, we have found very decided conflicts between these different purposes."

Under the TVA Act, the power proprietor, under long term contract to supply its commercial utility markets, is the sole judge between the conflicting claims. The Corps of Engineers, with no functions at Norris (Cove Creek) and with the functions of a mere tender at all dams in the TVA series, is without control over any essential function of navigation.

[This inconsistency in point of fact is pointed out here as a factual predicate to the argument made below that a usage, viz.: a permanent and continuing commitment to commercial manufacture of electricity, which is generically and economically inconsistent with a basic constitutional power (among others, regulation of navigation) cannot be rationally contended to be implied as an incident to the primary power with which it is intrinsically inconsistent; within the familiar principle as to conflicting interests—*Robertson v. Chapman,* 152 U. S. 673, etc.—stated below.]

(b) **Facts as to Lack of Relation to "Disposal" of Federal Property.**

The record shows that the program of TVA for commercial operation of the steam electric plants and for the rendition of utility service in fact or in practical effect commits the property to that servitude permanently. While the contracts authorized to be executed by TVA ran for 20, 30 or 50 years [under the provisions of Sections 5 (n), 10, 24 of the TVA Act], it was made plain on the record that when an existing utility is forced out of any service area, it will not be practicable to expect service to be resumed by any competitor with the government. If the government should subsequently withdraw the plants thus commercially operated from the supply of utility service, that service would suspend.*

This fact and the fact of the 20-~~30-50~~-year contracts demonstrate on the record that the commercial operation of these plants and their commitment to utility service was not only an exercise of the function of the government under appropriate authority of Congress to dispose of government property, but, on the contrary, definitely and practically prevents the government from disposing of the property in that it (a) subjects the United States to actionable damages should "disposal" of the property affect the TVA contracts, and (b) confronts the government with the practical alternative of bringing about termination of electric service in any utility area in order to make sale or other actual disposal of the property. Thus, **in point of fact,** TVA by contracts executed within its delegated discretion, blocks the continuing legislative duty and freedom of Congress to consider and take action for the disposal of government property.

(c) 1. Facts as to Claim of Government (TVA) to Proprietary Right to Appropriate, as Federal Property, the Waters of the Tennessee River Admittedly Not Necessary to be Manipulated in the Regulation of Navigation.

The facts on this record show that the sole basis for the claim of right of TVA to appropriate the waters of the Tennessee River to commercial manufacture of electricity rests on a claim of right to the waters as an incident to the right to construct an improvement of navigation in the Tennessee River. It was not sought to be proven, or contended by TVA on the record, that the government or TVA

***"The Authority should recognize its obligation to take care of the public service thus withdrawn"—Morgan, II-411.**

had acquired any proprietary right from the State of Alabama. Section 10570 of the Code of Alabama of 1923, authorizing licensees of the State, under conditions stated in the statute, to exercise in trust for the public (and subject necessarily to the laws and jurisdiction of the State) the proprietary right of the State in the surplus waters of the stream in the State of Alabama, does not pertain or apply to the federal government. The State of Alabama has not, in fact, purported at any time to yield or abandon its sovereignty or trust in the waters of the Tennessee to the federal government. Its formal position in the matter, acting through the Muscle Shoals Commission created by its legislature by Act approved February 10, 1927, was to deny the right of the federal government to make use of the waters of the Tennessee, not manipulated in the regulation of navigation, for commercial manufacture and sale of electricity (Infra).

(c) 2. Facts as to the Distinction and Inconsistency Between "Disposal" of a Steam-Electric Plant on Hydro-Electric Installation in a Navigation Dam and Permanent Operation of Such Properties in the Manufacture of Power as a Basis for a Commercial Utility System.

As has been summarized above, the record makes plain that commitment of these plants to permanent commercial operation is not a function of "disposal," but is, in fact, an impediment to disposal.

Further facts as to this conflict are more appropriately brought out in connection with the argument under the property clause of the Constitution set out below.

(d) Facts as to the Commercial Utility Program of TVA Being in Derogation of the Sovereignty of the United States and of the Legislative Power and Duty of the Congress.

The record makes plain as a fact and the Court recognized in its findings and restated in its conclusions that the Tennessee Valley Authority program involves a permanent and contractual commitment of the Government to the subordination of its credit, of its funds, of its executive and administrative personnel, to a permanent utility servitude throughout the area of its undertaking.

It is a necessary conclusion of fact on the record that this business could not be furthered without this long term commitment.

Without the permanent commitment, the record is conclusive that the Tennessee Valley Authority could not take the permanent market as threatened on this record.

The representation that the Government (TVA) is bound to its privies by long-term contracts is a material, in fact, an indispensable, assurance or assumption.

The facts on this record, as found and held by the District Court, make plain that the subjection of the Government and of Government properties to utility servitude, permanent in character, under actionable contracts, in fact, commits the Government to permanent utility service in state domain, is in derogation of national sovereignty and directly impedes and interferes with the continuing duty of Congress to exercise its legislative power in the public interest.

The facts attested by the record and found and held by the District Court made it plain that whenever TVA, an administrative agency, has in fact committed the Government to permanent utility service, under the circumstances above stated, there is practically no retreat, without reference to any contract. Perpetual utility servitude of the nature proposed by the TVA program is shown on this record to be essentially non-governmental. It involves the employment of working capital, exploitation, merchandising, the daily servicing of customers and the discharge of commercial functions which are non-governmental (Findings, 73, 106). For TVA power organization, see II-669.

Other material aspects in which the TVA program is violative of basic federal function and inconsistent with primary obligations of the Government are brought out under the argument on that point.

(e) **Facts as to the Effect of TVA Program as an Interference With the Regulation of Utilities by the Respective States.**

As to the fact of this interference there can be no doubt on this record. The exclusion of existing utilities serving the entire area, whether as a result of negotiation for ceded areas as by the contract of January 4th, 1934, supra, or competitive exclusion, would not leave it practicable for any new utility to establish itself, and inasmuch as all municipal or other utilities entering into a contract with TVA for the purchase of TVA power must accept the rate schedules prescribed by TVA, as well as service regulations, accounts and the disposition of revenues, there is no practical possibility for the state to exercise the normal functions of regulation in such matters.

The extension of TVA into state domain means the substitution of federal control and regulation of electric utilities for regulation by the states.

Certain facts have been stated above as to the effect of a disparity within the state of rates in TVA service area from those maintained under the general policy of the State of state-wide uniformity established by the record. The result must inevitably defeat the existing policy in Alabama of state-wide uniformity, and set up preferential industrial areas where government power is obtainable.*

(f) Facts as to Inconsistency of TVA Program in Its Entirety With the Letter and Spirit of the Constitution.

The conflict of the TVA program with the letter and spirt of the Constitution is so interwoven with the argument under that heading that no effort will be made to summarize the facts at this point. It is sufficient to assert here that the substance of the averments of fact of the bill of complaint as to the specific conflict of the program were fully sustained, and that the facts proven fully warranted the averment, not only as to the inconsistency of the program and of the acts complained of with the specific federal powers referred to above and with the letter and spirit of the Tenth Amendment, but established decisively the averment that the creation of TVA as a corporate agency with the broad powers of government assigned to and claimed by it effectively withdraws its activities from supervision, regulation or control, constituting in this case an abuse of the use of a roving powered federal corporation as a means to further the limited functions of government.

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*The common or ordinary knowledge of this circumstance is exemplified by press account of remarks by Hon. Kenneth D. McKellar at the signing of the TVA-Memphis contract on November 23, 1935:

"Memphis is the keystone of the arch. When Memphis begins to take electricity from TVA the success of the TVA actually is assured. In my judgment every single town in West Tennessee will come in, because it is to their interest to come in. I expect to see the Birmingham vote reversed, because it will have to be reversed if they compete with Memphis."

THE BILL OF COMPLAINT AND THE FINDINGS OF FACT.

In compliance with the requirement by this Court that bills challenging a public program on constitutional grounds shall not be "uncertain in aim and * * * meagre in particulars" (*Hegeman Farms Corp. v. Baldwin,* 293 U. S. 163), and that "the facts relied on must be specifically set forth" (*Pub. Serv. Com. v. Grt. North. Util. Co.,* 289 U. S. 130), the bill of complaint stated the case with the elaboration necessary to indicate the dominant characteristic of the program (*Borden's Farm Products Co. v. Baldwin,* 293 U. S. 194). The illustrative excerpts from the public releases and minutes of TVA set out in Exhibits 4, 7, 9 and 11 to the bill of complaint were admitted to be correctly excerpted from those sources (II-580, Finding No. 117); many of the principal averments of fact in the bill of complaint were admitted by stipulation (II-389 to 393), and there is no substantial controversy as to the facts necessary to determine the constitutionality of the program based either upon its dominant and controlling objectives as announced by TVA in formulating and executing it, or upon the acts and transactions complained of, considered alone.

In response to Equity Rule 70½ and the necessity for particularity in findings, required in the cases cited above, the District Court entered in the record the findings of fact which in themselves constitute an adequate statement of the basic and controlling facts in the controversy (II-1035). These findings of fact were not modified by the Circuit Court of Appeals. They were, in fact, expressly accepted and, in greatly condensed form for the purposes of an opinion, were paraphrased and restated in the opinion of that Court (78 F. [2d] at p. 580; Record, at pp. 1304-5).

THE CONTROVERSY AS PRESENTED BY THE STOCKHOLDERS' SUIT.

The appropriateness of the stockholders' suit, compliance with Equity Rule 27, the showing of injury and right to challenge the acts, transactions and statute in controversy as interpreted and in process of administration by TVA, were sustained by the District Court, under full findings of fact (II-1036, 1040) and specific conclusions of law (II-1097, 1099) as to those matters. Neither the conclusions of law nor the findings of fact as to that phase of the case were modified in any respect by the Circuit Court of Appeals.

For that reason, it is not deemed proper to elaborate the procedural detail of the stockholders' suit in this statement. A condensed statement of the facts and controlling authorities is set out below for consideration should the Court deem it necessary.

It is sufficient under the above caption to state that the bill and proof make a case of yielding by the management of the corporation to a commercial electric program undertaken by the Federal Government which would result in the immediate loss of approximately one-tenth of the utility service area of the corporation, the immediate loss of one-tenth of its customers, a corresponding increase and waste in the resulting margin of its idle power capacity left without a market, the immediate loss of all franchises and licenses within or related to the service of the initial area selected for occupation by TVA and the certainty of progressive loss and destruction of the corporation's service area, franchises, licenses and business as TVA shall extend its operations in the State of Alabama. Its intention to extend was manifest on the record, and is made a statutory duty by Section 11 of the TVA Act requiring equitable distribution of TVA power within the radius of transmission distance.

The facts have been stated as to the inability of the Alabama Power Company to compete with TVA in any area in which TVA undertakes to compete directly or through one of its standard forms of control-contracts (supra, p. 38 et seq.). The scope and area of the announced and overt TVA program will be stated below.

The service and utility undertaking of the Alabama Power Company is confined to and extends throughout the State of Alabama. Reference to Map "A" will show that the entire state is within transmission distance of the Muscle Shoals steam-electric plant and of the Wilson and Wheeler hydro-electric plants, and therefore within the threat of TVA commercial competition. The proof has already been mentioned that the TVA program leaves the Alabama Power Company and all utilities within reach of its discretionary competition unable to plan intelligently or economically for the public service, such as in the matter of extensions of lines and increase in power capacity (supra, p. 37).

All towns within transmission distance were encouraged by TVA to make preparations to acquire public utility systems for distribution of TVA power [Finding 70 (c), 72, II-1060].

TVA notified the Power Company on the date of the contract of January 4, 1934, in effect, that notwithstanding the truce by which it had agreed to confine its operations in Alabama Power Company territory for a limited period to the area to be ceded under the contract, TVA would entertain applications for extensions to be completed on expiration of the truce (II-508-9).

Reference has been made (supra, p. 26) to the recent PWA approval of an application of Bessemer and Tarrant City, suburbs of Birmingham a hundred miles south of Muscle Shoals, for a revenue-investment (accompanied by no pecuniary liability of the towns) in the construction of a competitive transmission line to transmit and distribute TVA power in that area. Map "B" portrays the existing network of principal high-tension systems in the 250-mile radius.

The foregoing briefly indicates the general scope of the encroachment of the TVA program actually existing and progressively inevitable.

THE FINAL DECREE OF MARCH 2, 1935.

The final decree (I-382) annulled the contract of January 4, 1934, which called for transfer of transmission lines and certain urban and rural distribution systems, as a going utility business, as being in furtherance of an illegal program of commercial electric operations, and restrained the defendant municipalities from furthering the program by acting as agencies of TVA to that end, which, in effect, included the acceptance of federal funds (without pecuniary obligation of the town) with which to construct systems for the distribution of TVA power under the domination and at the risk of the government.

The decree on its face purported to relate to the annulment of the contract of January 4, 1934, and relief related to that contract, on the theory outlined in Conclusion No. 27 (II-1101), quoted below, that further specific relief might be reserved for original or supplemental bill; but, in fact, the decree did require that TVA should not extend its lines and system (except to "fill in" customers on existing lines not presently served by the Power Company) except after application to the Court for determination by the latter whether the extension proposed was within the basic relief decreed.* One application of this nature for a right to extend the TVA system was made by TVA and denied by the District Court (R. pp. 1289-1293).

This lack of more specific provision and declaration in the decree, resulting in the necessity for continuing interpretation of various alternative methods proposed by TVA for accomplishing the same illegal result was the basis of the appeal by plaintiffs in No. 404, mentioned below.

The record discloses as a matter of fact the ability of the Government to change from TVA, to PWA, to REA, and to evoke straw corporations, all in pursuit of a common objective of the Administration and of TVA to put the government permanently into the business of commercial manufacture and utility distribution and control of electricity.

The pending allotments announced for the cities of Decatur, Florence, Guntersville, Hartselle, Russellville, Sheffield, Tuscumbia, Tarrant City and Bessemer establish the fact that a comprehensive declaration alone will avoid the supplemental and secondary actions and appeals which were plainly contemplated as probabilities (Concl. of Law, No. 27) but not forestalled by appropriate declaratory action in the final decree.

THE APPEALS (NOS. 403-404).

No appeal was taken by the Alabama Power Company nor by its mortgage trustee whose answers, the latter in the general nature of a request for affirmative relief, admitted or took no issue with the fundamental averments of the bill.

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*The decree also contained provisions for the orderly liquidation of the contract in other respects.

No. 403. The Tennessee Valley Authority and its directors, the defendants D. E. Lilienthal, A. E. Morgan, and H. A. Morgan, and the City of Florence (alone of the eighteen municipal defendants) appealed from the final decree of the District Court entered March 2, 1935. Their appeal is docketed in No. 403.

No. 404. The plaintiffs, for the reasons stated conceiving that there should be a more comprehensive decree, and declaratory action under the Act of June 14, 1934,* in order to dispose adequately of the controversy and meet the repeated shifts in the TVA plan potential on the record, also appealed (docketed in No. 404).

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*48 Stat. 955; 28 U. S. Code, Sec. 400; Judicial Code, Sec. 274 D.

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals erred in rendering its decree entered July 17, 1935 (Record, p. 1311), in reversing the final decree of the District Court rendered March 2, 1935; in failing to supplement, extend and, as so supplemented and extended, to affirm said decree, so as more effectively, to protect petitioners' corporation from the program, acts, transactions and methods of competition by the Tennessee Valley Authority and all of the defendants in or proposing privity with the Tennessee Valley Authority shown on this record to be in progress and threatened and in failing to award declaratory relief in the premises.

SUMMARY OF ARGUMENT.

A summary of the argument appears in the narrative headings taken from the text which are collected in the index. In order to avoid repetition that summary is not restated at this point.

ARGUMENT.

I.

GENERAL PRINCIPLES APPLICABLE TO THIS CASE.

A.

Powers Not Expressly Granted to the Federal Government Cannot Be Implied or Regarded as Incidental Where Their Exercise Would Be Inconsistent With Affirmative Powers Granted by the Constitution or With Its Letter and Spirit.

In declaring for the first time the traditional test as to means and agencies authorized by the Constitution for carrying into effect the substantive powers granted to Congress, Chief Justice Marshall stated as broadly the limitations to which the legislation must conform. That test, as stated in *McCulloch v. Maryland*, is of the utmost importance in this portentous matter. The words and their origin will be stated:

> "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." *McCulloch v. Maryland,* 4 Wheat. 316, at p. 421 (1819).

This definition, both as to the range of the incidental or implied powers and the limitation to which they must conform, has been handed down the generations and has been restated in the great decisions of the court involving the functions of the federal government.

The requirement that the means employed by Congress must consist with the letter and spirit of the Constitution can be better understood by comparing those words with the document from which the test laid down by the Chief Justice was adopted and supplemented.

Hamilton, while Secretary of the Treasury, had given, on February 23, 1791, his celebrated opinion to President Washington on the constitutionality of the first bank. The traditional test of relationship established by Chief Justice Marshall in *McCulloch v. Maryland*, made free use of Hamilton's expressions, quoted in the margin.*

It will be noted that Chief Justice Marshall was not content with the limitation upon the use of permitted means expressed by Hamilton. Instead of adopting the concluding restriction, employed by the latter,

> "Does the proposed measure abridge a pre-existing right of any State or individual?"

which suggested the necessity for an express conflict, the Chief Justice formulated the much broader declaration that the means employed by Congress must "consist with the letter and spirit of the Constitution."

***". . . The relation between the measure and the end; between the nature of the means employed towards the execution of a power, and the object of that power, must be the criterion of constitutionality, not the more or less of necessity or utility." (Works of Alexander Hamilton [Federal Ed., by Lodge], Vol. 3, p. 454.)**

* * * * * * *

"But the doctrine which is contended for is not chargeable with the consequences imputed to it. It does not affirm that the National Government is sovereign in all respects, but that it is sovereign to a certain extent—that is, to the extent of the objects of its specified powers. (Ib. 457)

"It leaves, therefore, a criterion of what is constitutional, and of what is not so. This criterion is the end, to which the measure relates as a means. If the end be clearly comprehended within any of the specified powers, and if the measure have an obvious relation to that end, and is not forbidden by any particular provision of the Constitution, it may safely be deemed to come within the compass of the national authority. There is also this further criterion, which may materially assist the decision: Does the proposed measure abridge a pre-existing right of any State or of any individual? . . ." (Ib. 458)

In the same opinion the Chief Justice gave expression to the corollary necessary to make this limitation vital. Asserting that the text of the Tenth Amendment leaves the question whether the particular power which may become the subject of contest has been delegated to the one government or prohibited to the other, to depend upon a fair construction of the whole instrument, giving effect to all of its provisions, the opinion further declared:

> "* * * should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government, it would become the painful duty of this tribunal, should a case requiring such decision come before it, to say that such an act was not the law of the land."

More than a century after McCulloch v. Maryland, this court stated in *Linder v. United States*, 268 U. S. 5, 17:

> "Congress cannot, under the pretext of executing delegated power, pass laws for the accomplishment of objects not intrusted to the Federal government. And we accept as established doctrine that any provision of an Act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power, but solely to the achievement of something plainly within power reserved to the states, is invalid, and cannot be enforced,"

and has given effect to this conception in a series of decisions which have saved the Constitution from futility and disintegration.

Bailey v. Drexel Furniture Co., 259 U. S. 20;
Hammer v. Dagenhart, 247 U. S. 251;
Kansas v. Colorado, 206 U. S. 46;
Schechter v. United States, 55 Sup. Ct. 837, 79 L. Ed. 888, 97 A. L. R. 947.

Under the test as formulated by Hamilton, the sole consideration is the question of the legitimacy of the end and the directness of the relationship. Under Hamilton's test the tax in the Child Labor Tax Case would not have been invalid. The statute did produce revenue, and the means employed had a direct relation to that end.

Under the additional test formulated by Chief Justice Marshall, the means employed by Congress must consist with the letter and the spirit of the Constitution. It is, after all, not solely a question whether the legislative intent was to regulate affairs reserved to the State. There ~~is~~ the further question whether, regardless of intent, the statute is in fact consistent with the theory of the dual system or plainly and palpably crosses the line.

In a cause of fundamental importance in America, which disposes of the basic contentions of TVA on this record, this Court in recent years has recognized that means proposed by Congress must not only have a positive relation to a constitutional end, but must be consistent with the Constitution:

> "This Court has said that while Congress, in the exercise of its power, may adopt any means having some positive relation to the control of navigation **and not otherwise inconsistent with the Constitution** * * *" [e. s.] *Wisconsin v. Illinois,* 278 U. S., at p. 415.

Apt at this point also is this expression from the court in *Veazie Bank v. Fenno,* 8 Wall. 533, in which the Court recognizes that the discretion of Congress in executing a power under the Constitution must not be exercised so as to transgress the underlying theory of the Constitution or conflict with other substantive duties imposed on Congress:

> "There are, indeed, certain virtual limitations arising from the principles of the Constitution itself. It would undoubtedly be an abuse of the power if so exercised as to impair the separate existence and independent self-government of the States, or if exercised for ends inconsistent with the limited grants of power in the Constitution" (p. 541).

Comparing the test of Chief Justice Marshall with the test proposed by Hamilton as applied to the License Tax Cases makes clear the application of the test in this case. What is more certainly a legitimate end of the federal government than to raise revenue? What is more directly related to that end than a system of licenses affirmatively authorizing the licensee to transact various businesses? That has been a source of revenue in all nations. Under the test as formulated by Hamilton, the end and the relationship exist; it would have followed that the federal government in order to raise revenue was authorized directly to license businesses.

But that result could not have been permitted without doing violence to the spirit of the Constitution and for all time this court has asserted that in order to earn money the government may not affirmatively license transactions within the States that are essentially commercial and local in character.

There is no provision of the Constitution authorizing Congress to establish a permanent commercial business in state domain, to regulate local utilities by competition, to promote public ownership and operation of local utilities under control and as an agency of the government.

The power to do those things is asserted by the Tennessee Valley Authority to be implied as means falling within the discretion of Congress, delegated by Congress to the TVA Board.

Petitioners assert that the means stated have no relation to any substantive power of Congress or the federal government; that if it were admitted that they were in direct furtherance of a federal function they not only conflict with specific functions and duties of the federal government but are inconsistent not only with the letter and spirit of the Tenth Amendment but with the spirit of those provisions of the Constitution which establish the character and functions of the National Government.

The express powers delegated to Congress must be exercised subject to the restrictions implicit in the other provisions of the Constitution.

Thus legislation under the commerce clause must be responsive to the Fifth and Tenth Amendments.

> *Monongahela Nav. Co. v. United States,* 148 U. S. 312, 336;
> *U. S. v. Joint Traffic Association,* 171 U. S. 505, 571-572;
> *Adair v. U. S.,* 208 U. S. 161, 180;
> *U. S. v. C. M. & St. P. Ry.,* 282 U. S. 311, 327;
> *Keller v. United States,* 213 U. S. 138, 148.

The war power must give heed to the Fifth Amendment. *U. S. v. Cohen Grocery Co.,* 255 U. S. 81, 88. And so as to all the great substantive powers. Even the power of federal taxation must respect not merely the Fifth Amendment, but the Tenth. *Collector v. Day,* 11 Wall. 113, 124; *Indian Motorcycle Co. v. U. S.,* 283 U. S. 570.

These limitations imposed upon the great and substantive powers granted by the Constitution are the more obviously applicable to methods prescribed by Congress and by Boards asserting arbitrary power under open delegation from Congress.

The means and instrumentalities challenged on this record do not rest upon the Constitution. They rest in part upon an Act of Congress the prototype of which was vetoed by two Presidents, was rejected by successive previous Congresses, was adopted over the most earnest protest during a period of national disaster and tension, and constitutes a departure from a tradition which has been unbroken for a century and a half. They rest in part upon the discretion of a board of three men with practically unlimited power.

Between them, this board and a majority in Congress are undertaking to commit the federal government to a course from which, in fact, there can be no retreat; to a commercial venture within State domain in a field which, over the 150 years of our history, has been recognized as the constitutional domain of the States.

Plainly, legislation enacted to give effect to a substantive power must not impair or defeat the legislative function, or the duty to provide regulations for and dispose of federal property or to regulate commerce, or the exercise of the fiscal powers or cross over permanently, arbitrarily and aggressively into the domain reserved to the states and their citizens by the Tenth Amendment.

Least of all can Congress confer upon a corporate or administrative agency power to commit the government or Congress to a permanent program which is inconsistent with the basic sovereignty and functions of the government itself, or the free exercise of the legislative duty, and therefore not consistent with the letter and spirit of the Constitution.

The negation of the delegation of legislative power is itself not an express provision of the Constitution. It is a necessary implication attaching to the legislative power. *Knickerbocker Ice Co. v. Stewart,* 253 U. S. 149, 164;

Panama Refining Co. v. Ryan, 293 U. S. 632; *Schecter Poultry Co. v. U. S.,* 55 Sup. Ct. 837.

It is as certain that restriction upon or negation of an implied power may be implied from the Constitution, as that powers themselves may be implied or held to be incidental. *Jackson v. Jackson* (Miss.), 107 So. 255; *People v. Brown,* 203 N. Y. 136, 142.

A commercial program undertaken by an agency of Congress based upon a series of long term contracts devised by a federal Board which in fact irrevocably commit the government to a course of action intended by the Constitution to remain subject to continuing legislative duty and discretion does not "consist with the Constitution" and is illegal. This principle underlies:

> *L. & N. Ry. v. Mottley,* 219 U. S. 467;
> *Norman v. B. & O. Ry.,* 294 U. S. 240.

Stated differently, it is obvious that a program cannot be held to be within the scope of implied or incidental powers

> —which is made effective through a system or series of contracts that plainly hamper the legislative function and withdraw facilities from use for war;
>
> —which, as affirmatively proven by TVA, is intrinsically and in the hands of TVA is necessarily antagonistic to the regulation of navigation;
>
> —and which as a permanent and region-wide utility servitude is in derogation of the nature of federal sovereignty and responsibility as well as inconsistent with the spirit of the Tenth Amendment and our dual system of government.

These principles underlie the District Court's Conclusion of Law No. 4 (II-1091):

> "The Congress is without authority to authorize an agency of the Government to bind itself or the Government to a long term commercial servitude for the operation within state domain of an electric network involving generation, transmission and delivery of electricity essentially proprietary and utility in type and having no relation to any lawful Governmental function."

B.

Commitment of the Government by Fixed Contracts to the Permanent Business of Commercial Manufacture of Electricity and Rendition of Regional Utility Service Within State Domain Is Intrinsically Alien to Federal Function.

This discussion of a program for the permanent commitment of the federal government to a commercial utility business throughout an area of 375,000 square miles, asserted to be inconsistent both with the letter and the spirit of the Constitution, cannot be more appropriately begun than by quoting the words of Chief Justice Nott, as found in *South Carolina v. United States,* 199 U. S. 437, 457:

> "Certain it is that if the possibility of a government usurping the ordinary business of individuals, driving them out of the market, and maintaining place and power by means of what would have been called, in the heated invective of the time, 'a legion of mercenaries,' had been in the public mind, the Constitution would not have been adopted, or an inhibition of such power would have been placed among Madison's amendments."

See opinions of the District Court below, *Ashwander v.*

Tennessee Valley Authority, 8 Fed. Supp. 893; 9 Fed. Supp. 965 (I-289, 376).

Tennessee Public Service Co. v. City of Knoxville, Chancery Court, Knox County, Tenn., July 17, 1935—Appendix, p. 124;
Kansas v. Colorado, 206 U. S. 46;
License Tax Cases, 5 Wall. 462;
Kidd v. Pearson, 128 U. S. 1, 24.

Congress may not invade the field of action reserved to the States and the people under the guise of exercising substantive federal powers:

Employers Liability Cases, 207 U. S. 463 (1908);
Hammer v. Dagenhart, 247 U. S. 251;
Child Labor Tax Case, 259 U. S. 38;
Hill v. Wallace, 259 U. S. 44;
Trusler v. Crooks, 269 U. S. 475;
Linder v. United States, 268 U. S. 5.

This invasion under claim of implied power is comparable to the futile effort to take property desired for public convenience under the guise of regulation (*Penna. Mining Co. v. Mahon,* 260 U. S. 393) or under the commerce clause or performance of international obligations (*International Paper Co. v. United States,* 282 U. S. 399).

That the commercial manufacturing business in competition with citizens is alien to federal function seems conceded by the Circuit Court of Appeals.* Yet that court gave no consideration whatever to the limitation asserted by Chief Justice Marshall as to the illegality of means which transgress the spirit of the Constitution. Its opinion does not graze any fundamental question presented on this ominous record.

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*"Of course, it is true that the Government of the United States cannot engage at will in private business." 78 Fed. (2d) at 582; II-1307.

So little effort has been made by the government over a century and a half to manufacture commodities for commercial sale or render services beyond the range of federal domain or use (except as incidental to liquidation of a war plant—*Clallam County v. Spruce Corporation*, 263 U. S. 41; see infra), or when conducted under territorial powers within the public domain, that the TVA stands not as a mere beginning or as a halfway stage but as a first, conclusive and permanent commitment of the government on a colossal scale to a program that is revolutionary, region-wide and final. This threatened casus is wholly without precedent, judicial or legislative, aside from the war control of railroads in two wars.

The first serious discussion of that intent arose in the American Congress in 1916 during the debates on Section 124 of the National Defense Act of 1916, 39 Stat. 166, 215, which, as elsewhere stated in this brief, contemplated the construction of plants capable of producing munitions and other useful products. The statute was obscure, plainly inadequate and doubtless void on that ground alone as authority for a commercial program revolutionizing the relation of the federal government to the states and its citizens, but notwithstanding these deficiencies in the statute, the debates indicate that after the prospective war emergency was over it was contemplated by the proponents of the measure that the government should engage, during time of peace, in continuous commercial production and sale of commodities to the public to the capacity of the (nitrate) plant, without relation to any requirement of the government.*

Brief excerpts from the debates are set out in the Appendix (p. 78, et seq.). The constitutionality of the commercial aspect of the program was challenged. It was defended on the ground, *inter alia,* of the general welfare clause in the preamble to the Constitution (Senator Smith of South Carolina, 53 Cong. Rec. Pt. 6, p. 5638), although *Jacobson v. Massachusetts,* 197 U. S. 11, had been decided eleven years before the debate.

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*The debates at the inception of this matter (1916) may be found in Cong. Rec., Vol. 53, Pt. 5, pp. 5146-9, 5687, 5706, 5956, 5957, 5962, 6031, 6032, 6120, etc. They are also reported in compact form in Powell: Cong. Debates, p. 752 et seq.

The measure was passed under the momentum of war pressure. In a general sense it had the support of the Democratic leadership and of the Democratic majority as a war measure and, notwithstanding its ominous implications, received support from among those who questioned its then fairly remote commercial implications. Thus Senator Kenyon supported the measure although he doubted the constitutionality of the "fertilizer proposition."*

And so the measure passed which resulted in the expenditure long after the war of more than a hundred and twenty million dollars on a so-called war purpose plant. This was the initial step in American history toward establishing the principle of federal commercial operation of "surplus capacity" resulting from intentional construction of plants for commercial operation, or from construction for an actual or supposed or miscalculated government requirement which has become spent or suspended. All such capacity so used is in fact commercial capacity, however acquired. The distinction between that **capacity** and the **product** resulting from the business of operation is discussed below.

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*"Mr. Kenyon. * * * Now, as to the fertilizer proposition, I am as much interested in that as the Senator from South Carolina. * * * I know the minute you talk about this you bump up against the Constitution. * * * There are more constitutional difficulties in the proposition than there are in the child-labor bill which my friend from South Carolina has so strongly urged as unconstitutional."—Cong. Rec. Vol. 53, Pt. 6, p. 5706; Powell: Cong. Debates, p. 760.

Capacity is referred to in this argument as "surplus capacity," meaning that there is no federal demand for the plant capacity thus described. Thus at Muscle Shoals Steam Plant and Wilson Dam, if secondary power is used for the trifling experiments, in phosphate production the total capacity is over sixty times estimated government requirements (Fng. No. 62, II-1057).

The contention of the Tennessee Valley Authority that it has the power to commit the government to a permanant program for the rendition of utility services, that is, to subject the government to an enforceable personal and commercial servitude, in the use of facilities overbuilt or obsolete for national defense or navigation or other federal purpose, is not only not supported by any provision of the Constitution, but is not justified by any discussion in the Convention of 1787 or in any ratifying Convention of the States, nor in any decision of the Courts, nor in any Message, or state paper of any President from General Washington until after the inauguration of Mr. Roosevelt.

The Convention declined to permit the inclusion in the Constitution of a clause authorizing Congress to grant corporate charters, lest it be assumed that the power to incorporate carried general jurisdiction to authorize charters not confined to the powers expressly granted. The proposal for inclusion of a power to charter corporations was proposed in these words as late as August 18, when the outline of the draft had become fairly complete:

> "to grant charters of incorporation in cases where the Public good may require them, and the authority of a single State may be incompetent."
>
> Madison's Journal, Aug. 18;
> Farrand, Record, p. 325, Vol. II.

The proposal was rejected. In short, the Convention deliberately declined to include an express power to permit the federal government to grant any charter whatever for a proprietary purpose. The contention is now that the federal government may discharge all proprietary purposes through the device of creating a corporation to "dispose of" government property by operating it commercially and permanently within state domain; although, as we document more fully below, the Convention rejected a general welfare elaboration of the property clause and returned to the safer ground of Madison's proposal.

It is not possible to reconcile this extraordinary conception with the known attitude of the Convention and of the ratifying states.

It can not be reconciled with the established reason for the adoption of the Tenth Amendment. Speaking to that point the Court in *Kansas v. Colorado,* 206 U. S. 46, 90, said that the amendment

> "disclosed widespread fear that the National Government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that if in the future further powers seemed necessary they should be granted by the people in the manner they had provided for amending that act."

The indispensable essence of a constitution is that the meaning and intent of its provisions, as they are interpreted by this Court as of the time of its adoption, shall not be changed except by amendment.

In his dissent in *South Carolina v. United States,* supra, at 472, Mr. Justice White but gave expression to an axiom in stating:

> "It is not, of course, by me denied that, however varying may be the conditions to which the Constitution is applied, that instrument means today what it did at the time of its adoption."

Certainly notions as to national collectivism by no means accepted *semper ubique et ab omnibus* cannot approach in gravity the change in the outlook of the American people as to the status of the American negro which crystalized after the adoption of the Constitution. That document had but reflected the current attitude of all English-speaking governments and people and had not regarded the negro as a citizen. Accordingly, under his judicial conviction of this grave certainty, Chief Justice Taney in announcing the opinion in *Dred Scott v. Sandford,* 19 How. 393, had no alternative save to declare that no change in sentiment could alter the known original intent of the Constitution. These words are among the most impressive ever delivered by this Court:

> "Such an argument would be altogether inadmissible in any tribunal called on to interpret it. If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption. It is not only the same in words, but the same in meaning, and delegates the same powers to the Government, and reserves and secures the same rights and privileges to the citizen; and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any

> other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day. This court was not created by the Constitution for such purposes. Higher and graver trusts have been confided to it, and it must not falter in the path of duty." (p. 426.)

The court accordingly held, and its conclusion has not been challenged on the point, that legislation under Article IV, Sec. 3, Cl. 2 (the property clause), is subject to all limitations of the Constitution that were expressed or implicit, including necessarily, as they decided, the Tenth Amendment. See *Downs v. Bidwell,* 182 U. S. 244, at pp. 290, 291.

The Tenth Amendment was ratified in 1790-91, and was to all intents and purposes a part of the original document. It expressed then and expresses now the conception that the States must not be subordinated in their internal affairs to federal regulation and control as to matters not expressly delegated.

> "That is a very narrow view of the Constitution which supposes that any political sovereign right given by it can be exercised, or was meant to be used, by the United States in such a way as to dissolve or even disquiet, the fundamental organization of either of the States. The Constitution is to be interpreted by what was the condition of the parties to it when it was formed, by their object and purpose in forming it, and by the actual recognition in it of the dissimilar institution of the States. The exercise of constitutional power by the United States, or the consequences of its exercise, are not to be concluded by the summary logic of **ifs** and syllogisms."
>
> Passenger Cases *(Smith v. Turner),* 7 How. 283, 428.

The disciplining and regulation of local utilities, by competition or monopoly, the promotion of public ownership of utilities to function under control of the government, the desire to supplement regulation by State authorities and State processes, the general desire to promote the industrial, social and economic welfare of the public in state domain in matters reserved to the States, were and are not functions of the federal government, however exigent they may be deemed by Congress.

> *Schechter Poultry Co. v. United States, supra;*
> *Railroad Retirement Board v. Alton Ry.*, 79 L. ed. Adv. 803, 55 Sup. Ct. 758;
> *Missouri v. Holland*, 252 U. S. 416.*

In the *License Tax Cases*, restated in *Kidd v. Pearson*, supra, the sharp line between the business of the citizen and the federal government is asserted in these words:

> "No interference by Congress with the business of citizens transacted within a state is warranted by the Constitution, except such as is strictly incidental to the exercise of powers clearly granted to the Legislature. The power to authorize a business within a state is plainly repugnant to the exclusive power of the State over the same subject". 5 Wall. 462, 470; 128 U. S. 1, 24.

It is difficult to conceive of any function which is by tradition, by organic nature, by unvarying precedent and by function more completely local and internal to the states than the function of regulation and operation of local utility service.

In no field has there been more striking legislative action, for generations, by the States, or a more progressive or complete pattern of local protection and control. Utility service is more than ordinary commerce. It is essentially local commerce, under sanction of the state. Local utility service is intrinsically incapable of national regulation. Even after extraordinary development of the service, interstate aspects are relatively insignificant.

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*"It is obvious that there may be matters of the sharpest exigency for national well being that an Act of Congress could not deal with." Per Holmes, J.

The principles as to dedication to the public interest, as to the areas of the utility undertaking, as to continuity and adequacy of service, as to taxation, as to rate classifications and as to the carefully designed system of regulation are essentially local.

Not even the all-inclusive National Industrial Recovery Administration proposed a code for utilities except as to wages and hours. There has been no suggestion that electricity locally manufactured and consumed affects a national public interest. It has no foreign market problem.

The decisions of this court have conclusively established the local character of utility distribution, and of generation of electricity.

> *Public Utility Commission v. Attleboro Steam and Electric Co.,* 273 U. S. 83;
> *Utah Power and Light Co. v. Pfost,* 286 U. S. 165;
> *Public Utilities Comm. v. Landon,* 249 U. S. 236;
> *East Ohio Gas Co. v. Tax Commission,* 283 U. S. 465;
> *South Carolina Power Co. v. Tax Commission,* 52 F. (2d) 515, 524; Affirmed 286 U. S. 525.

Under these conditions, there can be no possible justification for a program of the federal government "to advance navigation or national defense" by operating and dominating utility service of electricity in the State of

Alabama. No such program can have any rational relation to any federal purpose. Related or not, it devastates the spirit of the Tenth Amendment.

The progressive development of state regulation by administrative procedure is thrown into the discard by the destruction of control by state commissions.

C.

The Desire for Revenue Does Not Authorize the Federal Government to Commit Itself to Engage in a Permanent Commercial Business to Earn It.

There appears to be a growing impression by Congress that the desire to reimburse the Treasury may supply a basic lack of Constitutional power. A provision is now found inserted in various recent navigation projects providing for installation and inviting lease or commercial operation of electric units "to assist in liquidating the cost or aiding in the maintenance of the projects."

Such a provision was added by Section 5 of the Amendment of the TVA Act* approved August 31, 1935; is also found in Section 1 of the Boulder Canyon Project Act, 45 Stat. 1057, and in the Rivers and Harbors Act of 1935 (Pub. No. 409, 74th Cong.), purporting to validate Grand Coulee and Parker Dam following the decision in *United States v. Arizona,* 55 Sup. Ct. 666, 79 L. Ed. 681.

The phrase is employed apparently as a predicate for commercial operations by overbuilding a federal purpose project or superimposing upon it commercial units or processes having no physical or functional relation to the substantive purpose.

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*Appendix, p. 16. This series of self-serving phrases, always indicative of doubt of the validity of the measure, trace back to expressions employed in Kaukauna Water Company v. Green Bay Canal Co., infra, in connection with consideration of the right of the State of Wisconsin under affirmative provision of its constitution to condemn water rights, the State Court already having held that the proposed use was a public purpose, a conclusion obvious since Jones v. Portland, infra. The difference between these federal governmental agencies and the States and their agencies is absolute.

There is no more valid reason why the government can enter into the commercial power business in order to reimburse the Treasury for the cost of a dam than it can utilize a vacant floor in a post office or federal court house for the purpose of conducting a commercial business in the space in order to earn money and contribute to the cost of the structure.

The commercial utility business is no more related to navigation than would be any commercial undertaking in state domain which may earn or lose money for the Treasury and thus remotely and indirectly aid or impede the construction or maintenance of constitutional projects.

The tax clause (Art. I, Sec. 8, Cl. 1), the borrowing power, the Sixteenth Amendment, and the property clause authorizing disposal of federal property (Art. IV, Sec. 3, Cl. 2) prescribe, in general, the means by which and the conditions under which the government is authorized to provide funds. These means clearly do not include a commercial manufacturing business for the production of commodities, to be sold throughout state domain.

Obviously, the government having under bona fide exercise of a substantive power created a plant or instrumentality, or had the plant thrown on its hands as a result of obsolescence of its original purpose or improvident exercise of an honest discretion by Congress, can thereupon lease it, pending reserved use or future final disposition, and may reserve rent or compensation for the use. *U. S. v. Gratiot*, 14 Pet. 526. And see 40 U. S. Code, Sec. 303, 27 Stat. 321.*

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*The custom of the constitution as to raising money, as in the case of disposing of property, has over a century and a half negatived the idea of any general commercial business by the government. See discussion below, Government Corporations, V.

When on May 4, 1822, President Monroe vetoed the act for the preservation and repair of the Cumberland Road, he submitted a document* to the House of Representatives stating reasons in support of his message. His doubt was not so much as to the power of Congress to appropriate funds for the construction of the interstate road, as to the incidental consequences proposed to follow the appropriation, including the continuing power of collecting tolls. Mr. Monroe feared that the exercise of such incidental powers would infringe upon the field of action reserved to states.†

It is clear that in all cases involving the lease, or exaction of tolls for the use by the public of lawful instrumentalities, the original construction or acquisition must have been pursuant to a federal function and not have been solely or dominantly based on desire to realize money for the federal Treasury. Stated differently, the federal government plainly has no authority to acquire property in order to dispose of it at a profit.

In the amendment to the Tennessee Valley Authority Act, the proposal goes further. The commercial and perpetual operation is proposed in order not only to assist in liquidating the cost, but in order to aid "**in the maintenance of the projects of the Authority**". Here we have the complete syllogism: Commercial operations to raise funds **in order to continue the commercial operations.** This amendment to the Act abandons any pretense of serving any federal function through the commercial utility program. The object is commercial revenue to further a commercial business. The objective was clear enough from the outset; but here the unwary draftsman has indeed "nursed the pinion that impelled the judicial steel."*

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*"Views of the President of the United States on the subject of Internal Improvements," II Messages and Papers of the Presidents, p. 735.

†Reynolds, The Distribution of Power to Regulate Interstate Carriers Between the Nations and the States, pp. 48-49.

By what inversion of reasoning can it be contended that it is a function of the federal government not indeed to lease plants, awaiting some remote or vague federal use, but to assume a permanent utility servitude in order to earn money, if it can, by taking competitive markets from citizens?

On the record in this matter there is no assurance that the government will earn money or intends to earn it. No test for operations was prescribed by Congress or by the original Act. The TVA board was given complete legislative discretion whether to make urban distribution pay for rural service or whether to sell power to the entire region below the cost of production.

Not one dollar goes back into the Treasury except the mythical amount which this Board would not "in its opinion" consider "necessary for the Corporation in * * * conducting **its business in generating, transmitting and distributing electric energy and in manufacturing, selling and distributing fertilizer and fertilizer ingredients**" (1935 Amendment to TVA Act, Sec. 10)†. That clause is carte blanche to TVA.

Obviously the financial result of a federal undertaking neither justifies nor condemns the undertaking in a constitutional sense.

We eliminate, therefore, as having no significance except as a recognition of the lack of any substantive power, the self-serving phrases, foreign to the nomenclature of the Constitution, which have been urged below as giving validity to the commercial operations of the TVA.

***Am. Bar Assn. Journ., Sept. 1935. John Marshall: One Hundred Years After.**

†Appendix, p. 36.

D.

The Property Clause of the Constitution (Art. IV, Sec. 3, Cl. 2), Does Not Authorize Permanent Operation of a Commercial Business by the Federal Government.

The territory and property clause of the Constitution, Article IV, Sec. 3, Clause 2, is as follows:

> "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States, and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or of any particular State."

The property clause is found in the Constitution, **not among the legislative powers**, but among the clauses dealing with the relations between the state and federal governments.

> "Clearly it does not grant to Congress any legislative control over the States; and must, so far as they are concerned, be limited to authority over the property belonging to the United States within their limits." *Kansas v. Colorado,* 206 U. S., at 89.

Of all provisions of the Constitution the property clause is, by reason of its intrinsic nature, peculiarly subject to the requirement that the means employed to regulate and dispose of federal property should be consistent with the letter and spirit of the Tenth Amendment.

The only power of exclusive legislation conferred upon Congress by the Constitution is Article I, Sec. 8, Clause 17, relating to the District of Columbia and places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards and other needful buildings.*

Not even in the public domain can Congress regulate the public lands as a territorial legislature in such wise as to impair the rights of the citizens and the States in their traditional functions as contemplated at the time of the adoption of the Constitution. *Kansas v. Colorado, supra; Dred Scott v. Sandford, supra.*

The Genesis of the Property Clause and, Notably, the Rejection of a General Welfare Amendment by the Convention, Make Clear that Region Wide Commercial Operations in State Domain Were Not Contemplated.

Virginia had only recently ceded the Northwest Territory and North Carolina and Georgia were being urged and were expected to cede their claims to the territory now constituting the State of Tennessee. Other states were shortly to relinquish their claims to national domain. The delegates were familiar with the State monopolies of the Continent in staple commodities, salt, sugar, tobacco, spirits. These and similar products formed the basis of the wealth and the livelihood of the colonists who had recently fought a war for relief from the encroachments of government levied upon their commerce. The suggestion that the national power and national domain they were establishing could by bare majority in Congress, either for the purpose of treasury revenue or otherwise, be combined to bring about competitive annihilation by the government of the sustaining commerce of any of the states, or that the government could use the national domain and taxes levied upon the commonwealths to establish a collectivist monopoly of commerce, would have put an end to the deliberations.

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*"Within the District of Columbia and the other places purchased and used for the purposes above mentioned, the national and municipal powers of government of every description are united in the Government of the Union; and these are the only cases within the United States in which all the powers of government are united in a single government." Pollard v. Hagan, 3 How. 212, 223; and see United States v. Dewitt, 9 Wall. 41.

The historical record of the clause in the convention is of the utmost significance. It demonstrates that the convention intended no such power as asserted at this late day by TVA.

The passage of the Northwest Territory Ordinance by Congress on July 3, 1787, "made it clearly necessary that any new constitution should deal with this question," since the action of Congress in adopting the Ordinance was plainly beyond the scope of the Articles. "Madison, perceiving that the Committee of Detail in its Report of August 6 had made no provision for the situation, had submitted, on August 18, a motion for vesting additional powers in Congress, viz., 'to dispose of the unappropriated lands of the United States,' and 'to institute temporary governments for new States arising therein.' These being referred to the Committee of Detail, that Committee had reported, on August 22, a substitute for them couched in such language as to give to Congress an extraordinarily broad authority:

> 'to provide, as may become necessary, from time to time, for the well managing and securing the common property and general interests and welfare of the United States in such manner as shall not interfere with the governments of individual States, in matters which respect only their internal police, or for which their individual authorities may be competent.' "*

It is obvious that this proposal went far beyond the mechanism necessary to deal with the territories brought before the Convention by Madison, and on August 30th Morris, **reverting to the limited power suggested by Madison,** proposed the article, as it now stands. It was adopted with only one dissenting vote, "almost as an afterthought and towards the end of the Convention."* Here we have the significance of an affirmative substitution of Madison's suggestion in lieu of the broad general welfare provision after the latter had been formally proposed by the Committee as a marked enlargement of the clause.

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*Charles Warren, The Making of the Constitution, pp. 599-600.

This rejection of a general welfare suggestion is of impressive significance in connection with the discussion below as to the alleged power of Congress under the general welfare provision of the tax clause to make dynamic investments in furtherance of utility competition in State domain.

The most elaborate judicial reference to the territory and property clause is found in the several opinions in *Dred Scott v. Sandford,* 19 How. 393 (1857). We excerpt this expression, asserting that the property owned in common by the States included

> "many articles of value besides this property in land, such as arms, military stores, munitions, and ships of war, which were the common property of the states, which neither the new government nor any one else would have a right to take possession of or control, without authority from them; and it was to place these things under the guardianship and protection of the new government and to clothe it with the necessary powers, that the clause was inserted" (p. 436).

The conclusion forced by a consideration of the history and background of the clause is thus stated by the Court:

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*Charles Warren, op. cit., p. 600.

> "Consequently the power to make rules and regulations, from the nature of the subject, is restricted to such administrative and conservatory acts as are needful for the preservation of the public domain, and its preparation for sale or disposition. The system of land surveys; the reservations for schools, internal improvements, military sites, and public buildings; the preemption claims of settlers; the establishment of land offices and boards of inquiry, to determine the validity of land titles; the modes of entry and sale, and of conferring titles; the protection of the lands from trespass and waste; the partition of the public domain into municipal subdivisions, having reference to the erection of territorial governments and states; and perhaps the selection, under their authority, of suitable laws for the protection of the settlers, until there may be a sufficient number of them to form a self-sustaining municipal government—these important rules and regulations will sufficiently illustrate the scope and operation of the 3rd section of the 4th article of the Constitution" (p. 514).

With this basic outline of the clause, it is absurd to say that this clause was intended to open up the states to the destructive possibility of federal commercial operations, carrying by necessary implication the power of monopoly.

To assume that the Constitution meant, expressly or by rational implication, any such result, would be to condemn the personnel of the Convention to universal derision. This is not a case where the principles of the Constitution are to be applied to new conditions. The condition of ownership of public lands was proportionately greater at that time than it is today. The federal government could, by direct operation of the public lands beginning on the day ratification became effective, have taken every domestic and foreign market in every commodity from the people of the States, if ownership of land in trust for national purposes carried authority to operate commercially.

That action would have dried up the tax resources of the States. The possibility of that result could not possibly be sustained as having been contemplated or authorized either under the rule of original intent or under the test prescribed by Chief Justice Marshall. Not having any such meaning in 1787, it has no such meaning when, a century and a half later, the Congress for the first time attempts it.

Analysis of the Elements of Property Involved and the Threatened Acts of "Disposal" Indicates Plainly the Non-Federal Objectives and Means Employed.

We discuss elsewhere what we consider one of the basic errors in the opinion of the Circuit Court of Appeals, which ignores the 60,000 KW steam plant (subject to increase to 90,000 KW on order of the President and subject to be supplemented by steam plants, among other items, to the extent of $50,000,000 at the option of TVA under Section 15 of the Act). That opinion deals with the question as if pertaining solely to the disposition of "water power," as **property** of the government, which it is not; and as if Congress had any authority to subject the government to a perpetual utility business throughout State domain in order to dispose of property which it had intentionally created by operating a generating plant having no relation to navigation which it had intentionally built.

We also assert elsewhere the further basic mistake in that conception, its failure to recognize the absence of any proprietary element in the federal power to regulate navigation, and above all, its failure to reflect the distinction between running water as a "fuel" or raw material and the necessary intervening function of commercial manufacture and business necessary to produce electricity for the market (*Utah Power & Light Co. v. Pfost, supra*). The possible items of alleged "property" to be disposed of are (1) the steam plants, (2) the commercial hydro-electric units installed in the various dams, and (3) alleged "water power" owned by the government. The Commerce Clause is obviously a duty, a governmental power, which, like the police power, can not be fettered and debased by selling it, committing it or abdicating it to utility customers.

The result is effectively to remove the most valuable asset in the river itself perpetually from the proprietary ownership by the State and its citizens, for no one supposes that the slow process of river navigation has, as an instrumentality of transportation, more than an academic value today.

The proposal of TVA is to convert the potential power in the stream into transportable form, thereby exhausting it from the stream, transport the converted product 250 miles and sell it commercially. When that is done throughout the river, every ounce of water power has been wrung from it by the federal government and taken away from the State and the people who own it, in as real and final a sense as was proposed on behalf of the government* and denied by this Court in *Kansas v. Colorado,* supra, to withdraw the waters from the Colorado.

As asserted by the Circuit Court of Appeals, "If the water stored at Wilson Dam is permitted to pass through the penstocks, in the language of counsel for TVA, 'there is gold in it,' but if allowed to flow unhindered over the dam 'it is forever gone',"† and therefore Congress has the right to pan it out of the stream by erecting a plant for the purpose of extracting the power.

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*and recognized by Chairman Morgan as the equivalent of the "economic" relationship to navigation of the TVA commercial power program. (Morgan, II-415).

†It may be added here that after the gold is extracted by the federal government and transported for commercial sale, it is forever gone.

The assertion that the gold or the fish or the "water power" in the bed or waters of a running stream is created by the United States by reason of its erection of a concentration plant or a fish trap or a power dam is organically defective in analysis of the facts. That element of actual or potential value in the river is inherent in the proprietary right of the State, and Congress has no right to appropriate or acquire it for commercial purposes. If there is waste there is no waste of any proprietary asset of the federal government.

We assert here that:

(1) Engaging in the business of operating the steam plant for manufacture of electricity for commercial sale to the public at any place or for any term is not a function of "disposal" of the steam plant within the meaning of the property clause.

(2) Engaging in the business of manufacturing electricity at the commercial units installed in the dams is not a function of disposal either of the plants or of the "water power," even if the government had any proprietary right to exhaust the power in the water as a commodity, by concentrating the surplus waters of the stream.

(3) The steam plants and the hydro-electric plants are all that the government owns or can dispose of. It cannot sell or otherwise dispose of the duty of regulating navigation. It can lease emplacements in the dam. Subject to limitations, it can lease hydro-generators and charge a rental for the use, permitting the lessee **if also licensed by the State** to get the benefit of the water flow, as dispatched by the government in the regulation of navigation and un-

fettered by any illegal commitment to antagonistic utility service.*

The government has no more authority to sell the water or the right to the flow of the water than it has to sell the right to coin money or guarantee that the Bankruptcy Act will not be amended.

Not having the right to sell the transit of the water, it cannot dispose of any such right **as property.** The government, presumably, can free navigation flumes in the Columbia River of salmon by trapping them out, but the conception that it could go into the permanent business of taking and packing and merchandizing throughout state domain the salmon thus impounded, as a yardstick to regulate the price of salmon in state domain, would be regarded as preposterous. *McCready v. U. S.*, 94 U. S. 391.†

The only difference between the waters and the fish is that Congress can directly manipulate the waters **in regulation of navigation**; but having done that it has no further or incidental or "necessary" right either in fish or waters.

No implied power can arise to dispose of something and to go into permanent business to do it when the thing itself (water) is not government property and the government can take it only by violating the Constitution. The state as the proprietor in trust could not grant to the government the right to use the waters of the Tennessee in that state for commercial purposes or to regulate local utilities. *Infra.*

As we have seen, even if running water could be regarded as property of the government, as tangible as coal or oil, it could not be disposed of under the property clause of the Constitution by regarding it as a base raw material* to be transformed by commercial manufacture into a different product for commercial sale to the public any more than the government can manufacture coal taken from the public domain into coke and by-products or into power, for commercial competitive sale in state domain, if either the state or its citizens who are injured object. It results from even a superficial analysis that the government owns no "water power". It owns merely a plant, which it may lease, and a sovereign duty which it may not.

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*See Statement, supra, p. 59 et seq., showing the antagonism in permanent commitment of the Government to a proprietary interest and obligation in producing power.

†"The States own the tide-waters themselves, and the fish in them, so far as they are capable of ownership while running" (p. 394).

So much for operating these plants for commercial sale, without reference to the characteristics of the business superimposed by TVA on that function.

Conduct of a Permanent Business Is Not a Function of Disposal.

We have stated that a commitment of the government, by long term contracts, to operate a permanent utility business would involve the government in non-federal functions not fairly related to property; that the commitment would involve credit, executive and administrative personnel, and the funds of the government in a permanent service non-governmental in character. These permanent and extraordinary business services are not functions of the ownership of property.

If any arrangement under which the government makes active use of its property, other than by lease or similar stand-by or interim arrangement, is disposing of it within the meaning of Article IV, Sec. 3, Cl. 2, it necessarily follows that such use must be in the nature of a governmental use, since, other than lease or similar arrangement, there is no right (except use for governmental purpose, sale or disposal outright) in property in the federal government; nor any right to engage in proprietary business under any power except where the business itself is in direct furtherance of a substantive power.

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*As assumed by Chairman Morgan in accepting the revenue possibility of delivering the waters of the Tennessee for irrigation or water supply as an apt analogy to the relation of commercial production and sale of electricity to navigation:

"I would make no distinction between going into transmission and utility distribution of power and transmission and distribution of water sold generally to the public, if that would support and make more feasible the primary purpose." (II-415)

> "The United States cannot hold property as a monarch may for private or personal purposes."
>
> *Van Brocklin v. Anderson,* 117 U. S. 157, 158;
> Cf. *U. S. v. Trinidad Coal Co.,* 137 U. S. 160, 170.

It is no longer subject to doubt that proprietary operations of this character are, even where temporary or provisional, essentially non-governmental.*

They may be permitted to the State governments by their own constitutions where the business is a public one justifying the taxing power (*Jones v. Portland,* 245 U. S. 217; *Green v. Frazier,* 253 U. S. 233; *Puget Sound L. & P. Co. v. Seattle,* 291 U. S. 619); but, such functions being essentially commercial and proprietary, they cannot be lawfully carried on by the federal government at all, even as a single isolated act or transmission, except where reasonably related and actually subordinated to the execution of a dominant substantive function expressly granted to the government and where, even then, the commercial function employed as a means "consists with the letter and spirit of the Constitution."

Had business been a function of ownership, the corporation tax cases, infra, decided before the Sixteenth Amendment, must have decided that the tax was invalid.

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*Helvering v. Powers, 293 U. S. 214; Ohio v. Helvering, 292 U. S. 360; South Carolina v. United States, 199 U. S. 437.

The question is whether the use of property as a basis for a commercial manufacturing and utility business is a function of disposal.

The United States, holding all property either for governmental use or for sale or disposal in trust for all the people, that is, for national purposes, it follows that the basic principles relating to trust estates apply.

Power conferred upon a trustee to sell or to convey or dispose of a trust estate for any given purpose or beneficiary carries no authority to engage in business by means of the property.

> *In re Corbin's Will*, 91 N. Y. S. 797;
> *Pearce v. Pearce,* 199 Ala. 491, 74 So. 952;
> *Rifling v. Burnet* (C. C. A. 8th), 47 Fed. (2d) 859.

This Court asserted in *U. S. v. Gratiot*, 14 Pet. 526, that the power to dispose of government property includes the right to lease mineral properties of the United States for a rental, payable in smelted ore (lead) desired by the War Department.

The lease in that case was made under a statute approved March 3, 1807, authorizing leases of the lead mines in Illinois for a term of not exceeding five years. Land was held to be within the meaning of Article IV, Sec. 3, "respecting the territory belonging to the United States." It was objected that the discretionary power to lease federal lands might result in encroachment upon State rights. The Court, appropriately to the facts of that record, answered the objection with this statement:

> "There can be no apprehension of any encroachments upon state rights by the creation of a numerous tenantry within their borders, as has been so strenuously urged in the argument" (p. 538).

If, as on this record, the facts in *U. S. v. Gratiot* had shown that the federal government was proposing to use the public domain, by systematic device of leases or otherwise, to conduct and monopolize commerce in any commodity or business in state domain, nullify the Tenth Amendment and substitute for regulation by the states the arbitrary action of three nine-year officials, then the opinion cited necessarily implies that those facts would have received consideration by the Court in determining whether the means employed by Congress did, indeed, as they must in order to be valid, "consist with the letter and spirit of the Constitution."

If that were not true, if the right even to lease were absolute, the Court would have stated that the power to dispose of property by lease or according to any method approved by Congress was absolute.

It is significant also that the Court noted that the statutory authority under which the lease was made was "limited to a short period, **so as not to interfere with the power of Congress to make other disposition of the mines** should they think proper so to do."* This affirmative and uniform legislative and departmental practice is impressive evidence negativing the interpretation for which TVA contends. That suggestion is apt in connection with the point elsewhere made in this brief that a permanent commitment of the government property to utility service resulting from the contracts underlying the TVA program tangibly and substantially interferes with the continuing duty of Congress as to sale or disposal of property owned by the government.

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*Compare the statute which in one form or another has been in effect for generations authorizing lease of property by the Secretary of War not necessary for government use, 40 U. S. C. 303; and the practice by the War Department under that Act in leasing the Muscle Shoals Steam Plant (continued by TVA until 1934).

Here Congress has not made a lease for a long or short period, either of the steam plant or of the commercial hydro-electric units installed in these dams, as at Boulder. Technically, Congress is free therefore to sell or dispose of either by lease; but actually the commitment of the properties by TVA to a permanent and continuing service under actionable, non-assignable contracts is an interference with disposal. It is therefore not a use or disposition of property under any definition of the term which "consists with the letter and spirit of the Constitution," considered relation to the functions of the federal government. As to its provisions and its spirit relating to the States and their Citizens—the Tenth Amendment—the proposed abuse of the property clause (operating plants in a commercial business in state domain instead of leasing or selling them) the extent, nature, encroachment and arbitrary procedure of the Tennessee Valley Authority leave no aspect of the program consistent with the Constitution.

The Conduct of a Permanent Utility Business Is Not a Function of Conservation of Government Property.

This is not a case where it is essential to the maintenance of a navigation dam or of generators installed in a navigation dam that the generating units be operated for commercial production (if this could ever be the case) even assuming that they were installed for governmental use and not for commercial operation, as the latter has been shown to be the case on this record. The Court found that it was not essential to the maintenance of the dam or generators (Fng. 43, II-1048).

Precisely the same conclusion was reached and is obvious as to the steam-electric plant at Muscle Shoals.

It is accordingly insisted that, so far as the property clause is concerned there is no basis whatever for stating that a steam-electric plant or a hydro-electric plant are being "disposed of" or regulated within the meaning of the property clause by committing them permanently to the business of manufacture in order to create a commodity, in order, in turn, to "dispose of" that commodity, in order, in turn, to regulate local utility service, finance and promote public ownership, or like non-federal functions.

The contention of TVA would prove too much, if accepted. A plant is of no value without a raw material to process, and of no higher constitutional status, as property, under Art. IV (3).

If the Government may purchase coal or oil (or appropriate and subordinate flowing waters in a navigable stream to utility purposes in violation of the trust and duty to limit the interest and action of the government in the waters to the regulation of navigation) in order to "dispose of" a steam or hydro-electric plant by manufacturing power, there is no reason why it should stop at a single raw material or a single process or, indeed, why it should stop short of the establishment of a vertical industry for the commercial production of some ultimate product, from mine to consumer. Nor would there be any proper reason why, if the Government can purchase coal or appropriate water to operate and thus "dispose of" a **plant**, why it should not, having coal or oil, purchase a plant to convert and "dispose of" the raw materials in a nation-wide business.

The result of accepting that contention would be a conclusion that there is no limit whatever to the commercial functions of the Federal Government, since the ownership of the public domain and the war clauses would enable Congress to acquire any kind of plant or material not already owned, and dispose of it by purchasing and processing all necessary collaterals to the commercial manufacture and sale of any element. Having the button, it could manufacture the pants.

Possible War Uses For a Product Do Not Justify Its Commercial Manufacture and Sale by the Federal Government.

The so-called critical and strategic war materials reasonably necessary for military purposes in time of war or for the sustenance or war psychology of the civilian population, are innumerable. Every essential industrial plant is a potential war requirement, within the discretion of Congress. Contraband of war under modern practice is an all-inclusive term. Plants for the processing of these materials are plainly within reach of military preparedness, so far as review by the Courts is concerned, in the absence of a palpable abuse of the war power.

In *Highlands v. Russell Mfg. Co.,* 279 U. S. 253, this court accepted as of course the contention that the business of manufacturing snow plows for railroads during the war period was a national use for which coal and other private property may be taken by exertion of the power of eminent domain. A plant acquired by the War Department for the manufacture of snow plows or steel, or textiles or reinforcing bars, or any one of the thousands of primary or secondary public requirements in time of war may, it is contended by the Tennessee Valley Authority, be operated during time of peace to capacity in order to produce some negligible fraction of the output for current use by the United States Government and the remaining volume be dumped in State domain in commercial competition with citizens.

It is not strange that it required well over a century for that fantastic interpretation of the property clause to be seriously advanced.

This gravely important phase of the record was considered and dealt with by the District Court in unanswerable conclusions (Nos. 8 to 15, II-1092). It is submitted that they were completely ignored by the Circuit Court of Appeals, although that Court fully recognized that

> "It is not the purpose of TVA to limit the production of electric power to that needed by the Government in manufacturing war materials and providing for navigation, but its declared policy is to utilize to the fullest extent possible all the electric energy which the Wilson and other dams are capable of producing, by supplying first governmental needs, and then by selling the surplus to users of electricity, in competition with public utility corporations engaged in the manufacture, transmission and distribution of electricity. In disposing of surplus power TVA intends to obtain revenue, but at the same time to undersell its private competitors in order to establish a "power yardstick" and to demonstrate the advantages of public over private ownership of electric light plants" (78 F. [2d] 580, Record p. 1305).

Again we ask the Court to note the omission from consideration of the steam plant, of greater prime capacity (before completion of Norris) than Wilson Dam.

There is little justification for confusing the elements entering into the manufacture and transmission of electricity and the distinction between the ownership of property and the business of manufacturing, since the decision in *Utah Power & Light Co. v. Pfost*, 286 U. S. 165:

> "Thus, by the application of human skill, a distinct product is brought into being and transmitted to the

> places of use. * * * The process by which the mechanical energy of falling water is converted into electrical energy, despite its hidden character, is no less real than the conversion of wheat into flour at the mill'' (p. 180).

Even lumber, on being milled, becomes materially changed in ''character, utility and value.'' *Arkadelphia Milling Co. v. St. Louis Southwestern Ry. Co.,* 249 U. S. 134.

We deny that if the Government owned wheat it could at Muscle Shoals or Wilson Dam process that wheat into flour to the maximum capacity of the so-called ''government purpose'' plants as a basis for the intentional conduct of a permanent merchandizing business in state domain, in known and intentional excess over any government requirement. There is no constitutional distinction between wheat, coal and water, except that the government owns coal (in trust **for governmental purposes or for disposal**) in the public domain. It is conceivable that it may acquire wheat, and may dispose of those commodities as such, in furtherance of some legitimate function justifying the acquisition; but as to the waters of running streams it cannot under the Constitution acquire any right whatever for proprietary and non-governmental purposes even by grant from the State. *Pollard v. Hagan,* and discussion *infra.* Certainly not for the purpose of manufacture.

Nor, as to coal purchased on the market, can the Government process that coal into power for commercial distribution.

Orderly and Bona Fide Liquidation of War Investments Is Clearly Distinguishable.

There is a sharp distinction between the disposal of federal property in bona fide retreat from and liquidation of a war investment, after the conditions justifying its acquisition or operation have passed, and the intentional continuation of the function notwithstanding termination of the governmental purpose.

This is not a case involving any question of time or opportunity for liquidation, since the program involves a permanent proprietary project intended to continue perpetually.

Cases involving operation pending bona fide liquidation following war are plainly inapt as supposed precedents for continued utilization of property for all possible commercial purposes to which the property may be adaptable, in the opinion of Congress or some board with unlimited discretion to rove at will.

Thus, in the case of *Clallam County v. United States Spruce Corp.*, 263 U. S. 341, heretofore cited by TVA, there was organized a state corporation for the purpose of liquidating a large investment of the government made for the production of spruce products for war purposes. The question was whether during the liquidation of the investment the government had overstepped its governmental purposes and had converted it into a proprietary enterprise, thus rendering the property subject to taxation by the State. The Court pointed out that the original activities of the corporation were wholly directed to the government's program of production of aeroplane lumber, and that

> "after the Armistice these activities have been directed to liquidating the corporation's affairs, al-

> though to accomplish it some further contracts have been made, but, as we understand, solely for that end. * * *
>
> "In short, the Spruce Production Corporation was organized by the United States as an instrumentality for carrying on the war, all its property was conveyed to it or bought with money coming from the United States, and was used by it solely as a means to that end, and when the war was over it stopped its work except **so far as it found it necessary to go on in order to wind up its affairs.**" p. 344. (Emphasis supplied.)

This Court will not assume bad faith as to method; but the Tenth Amendment does not permit the government to extend a fire sale into a permanent business.

Motives, however, that are palpably disingenuous are entitled to no quarter. Thus, in *International Paper Company v. U. S.,* 282 U. S. 399, government counsel opposed a claim for compensation for the diversion of water for power on the theory that the diversion, under orders of the Secretary of War in aid of war production, might have been accomplished by an order issued in regulation of navigation or of international duties terminating the claimant's license to use the water. The Court, through Mr. Justice Holmes, asserted that "**the Secretary of War did not attempt to pervert the powers given him in the interest of navigation and international duties to such an end.**"

It is difficult to see how the exhaustion in whole or in part of the purpose for which alone the plant was lawfully acquired gives rise to the right to use it for all purposes, as a bona fide liquidation or residuum of the spent purpose. The more grievous the error (such as the write-off of over $100,000,000 at Muscle Shoals by TVA) the greater the resulting commercial activity authorized in State domain; the less the governmental use, the greater the power to engage in non-governmental functions. The argument of TVA is that when the governmental function disappears entirely the government may then in perpetuity operate the property for commercial purposes.

The suggestion that if there is 1% of governmental use there can be 99% of intentional commercial exploitation, reduces the "surplus" doctrine to manifest absurdity.*

There is a Fundamental Distinction Between Ownership or Leasing of Property and Doing Business.

The Federal Government, in a variety of methods, may acquire property almost without limit as to type, such as the original public domain, by grant, by forfeiture for violation of law, confiscation for federal taxes, treaty, conquest, bequest (subject to restrictions by the State as to inheritances) or condemnation for government use.

There is a fundamental constitutional distinction between holding this vast property for disposition or for reserve governmental use or permitting its availability to citizens on the one hand, and proprietary commercial operations by means of the property on the other. One is the holding of property in trust for delegated uses, with the right and obligation to maintain pending disposition. The other is the transaction of business.

There are fundamental distinctions between organic acts of ownership or the disposal or lease of property, and the function of engaging in business by means of the property. The corporate income tax cases sufficiently illustrate the point to require no further documentation. The constitutional cleavage is clear.

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*A germ may determine paternity but it does not determine legitimacy or carry an hereditary immunity to all descendant implications.

> *Von Baumbach v. Sargent Land Co.*, 242 U. S. 503;
> *Flint v. Stone Tracy Co.*, 220 U. S. 107;
> *Zonne v. Minneapolis Syndicate*, 220 U. S. 187;
> *McCoach v. Minehill & S. Ry. Co.*, 228 U. S. 295;
> *U. S. v. Emery B. & T. Realty Co.*, 237 U. S. 28;
> *Lucas v. Extension Oil Co.* (C. C. A. 5), 47 Fed. (2d) 65, and cases cited.

E.

The Commerce Clause Does Not Authorize the Federal Government to Engage in a Commercial Business.

The power to regulate commerce does not authorize the Federal Government to engage in the business of commercial operation, within state domain, of electric transmission or distribution systems, nor does it authorize the Government to engage in the proprietary business of manufacturing electricity for commercial sale. We have pointed out in a different connection and repeat under this heading that the distinction has been definitely made by this Court between the construction, maintenance and operation of the mechanical instrumentalities of commerce and the function of engaging in commerce by means of those instrumentalities. This distinction has been recently emphasized.

Detroit International Bridge Co. v. Appeal Board, 294 U. S. 83, reaffirming *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, stated:

> "After much consideration, and notwithstanding emphatic dissent, *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, held that a Kentucky corporation which

owned and operated a bridge over the Ohio River between that state and Indiana, and collected compensation from railroads using the structure, was not engaged in interstate commerce. By Chief Justice Fuller this Court said:

> "The Company was chartered by the State of Kentucky to build and operate a bridge, and the State could properly include the franchises it had granted in the valuation of the Company's property for taxation. * * *
>
> "Clearly the tax was not a tax on the interstate business carried on over or by means of the bridge, because the bridge company did not transact such business. That business was carried on by the persons and corporations which paid the bridge company tolls for the privilege of using the bridge."

That manufacturing electricity is not commerce, whether at a power dam in a navigable stream or in an inland steam plant, is a truism.

Utah Power & Light Co. v. Pfost, supra;
So. Car. Power Company v. Tax Commission, supra.

Nor is transmission from the Muscle Shoals and Wheeler and Guntersville Dams into the service area of Alabama Power Company interstate commerce. Even if manufacturing or transmission were interstate commerce and subject to the federal power of regulation under the commerce clause, it seems fantastic that the argument should be made that the government has the right, by means of the instrumentalities which it has created to preserve and foster commerce, to engage in the business which constitutes commerce in competition with and resulting in the inevitable annihilation of precisely that commerce between citizens which it assumes to perform.

This court has repeatedly restated the proposition that the power to regulate a business does not confer the power to engage in it as a function of government. *Helvering v. Powers, Ohio v. Helvering, South Carolina v. U. S., supra.*

The Tennessee Valley Authority asserts that having established a mechanism to foster and preserve commerce, the government has the implied power to use the mechanism to destroy commerce.

It seems so clear, on reason and analysis, that the commercial utility function of TVA finds no support whatever in the commerce clause, that we feel some hesitation in treating it seriously. It forms, however, intangibly, the basis of the contention of TVA as to its proprietary ownership of rights in waters, and is thus carried by a lateral pass into the property clause, where the alleged rights in waters are "disposed of" first by conversion into power and then by utility distribution throughout state domain. Because of the basic insistence upon the Commerce Clause it becomes necessary to discuss that clause, in its origin and outline, in order to test the validity of the claim as to its effect in conferring a proprietary right in running waters.

Protection of Commerce of the States From Interferences Within the Nation Was a Basic Motive Underlying the Draft of the Constitution.

The acute differences in interest between the delegates to the Constitutional Convention related to the protection of their commerce. Trade regulations and discriminations and the lack of power in the Confederation to make treaties with continental nations that would be honored by the States furnished plain obstacles to those assurances of commercial protection deemed requisite by all of the states. So apprehensive was the State of Virginia, with the largest commercial production, as to the original phrasing of the Commerce Clause, that the representatives of that state were unwilling to delegate to Congress the regulation of interstate and foreign commerce "without the consent of two-thirds of the members present in both Houses."*

That provision, indeed, remained in the draft of the Constitution until late in the deliberations of the Convention, when it was eliminated at the insistence of the New England states. George Mason for that reason declined to sign the Constitution, and in the Virginia Convention vigorously opposed it, because of his fear that the commerce clause would not protect the commerce of the State of Virginia against discriminatory legislation by a bare majority in Congress.†

His apprehensions met with sweeping reassurances from his own colleagues from Virginia and from other members of the Convention. The asserted view of those approving the document was that the effect of the clause would be to protect commerce and meant merely its freedom from discriminatory action within the states and protection in the matter of treaties.

The question is merely whether the Constitution is to be given effect according to its intent or whether sweeping powers authorizing the government to engage in commercial operations by means of instrumentalities provided to further commerce, are now to be discovered after 150 years.

No purpose could be attained by elaborating the circum-

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*Also C. Pinckney; see **Charles Warren**, The Making of the Constitution, 461, 462, 567-589.

†See **Warren**, id., p. 580: "It is impossible to understand properly the fight over the adoption of the Constitution in the Convention, or over its ratification outside, unless this fear of the South at Northern domination of its commerce is thoroughly realized."

stance that the Convention definitely rejected the proposed amendment to authorize Congress to construct canals. Familiar ground is Madison's letter to Edward Livingston of April 17, 1824,* stating his own view and that of Hamilton, "with the views of the Convention fresh in his memory," that the power of the Federal Government did not extend to the construction of canals. We know that as to instrumentalities of interstate commerce, that view, entertained also by Monroe and by Jefferson, has yielded, and that the power of regulation extends to the maintenance by the federal government of the basic instrumentalities of commerce,† where, at least, the absence of such instrumentalities gives a real relation to the needs of commerce for their establishment; a very different question from the substitution of government for regulated ownership of existing instrumentalities as a dominant objective or in order to regulate existing commerce by competitive federal operation; announced by TVA as its function toward local utility service:

> "The power policy written into the Tennessee Valley Authority Act represents an attempt to regulate public utilities not by quasi-judicial commissions, but by competition" (II-624).

The Cullum Report preceding the adoption of the Interstate Commerce Act, asserted that regulation through public ownership has been practically unknown in the United States; that it was of foreign origin, and foreign to the character of our institutions. It asserted that the time may come when the people of the United States would be forced to consider that course, but that because of the dangers to be apprehended "from the giving of such additional power to the government" the committee did not consider that procedure desirable "until other methods of regulation more in the American spirit have at least been given a fair trial and have proven unsatisfactory."

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*III Farrand, Records of the Federal Convention, p. 463.

†In any event, that power is referable to the combination of the commerce, war and post-road clauses.

The early controversy resulting in successive vetoes is mentioned here as showing the view of the delegates themselves even as to the matter of the instrumentalities. It now appears to be contended that the delegates were not only wrong in their conception of the scope of the Constitution as to the instrumentalities of interstate commerce, but had actually embedded among the powers authority not only to create the instrumentalities for interstate commerce but actually to engage without limitation in commercial business itself by means of these instrumentalities.

It is noteworthy that the only absolute provision of the Constitution against the power of taxation both of the federal and state governments, the most important of all of the powers of government and a basic weakness of the Confederation, are Article I, Sec. 9, Clause 5, denying unconditionally to the federal government any power to levy a tax or duty on the outgoing commerce of the states (exports), and Article I, Section 10, Clause 2, limiting the power of the states in taxing imports and exports, that is, commerce, to those "absolutely necessary for executing inspection laws," and, by an amendment added by the Committee on Revision on almost the last day of the Convention, to Article I, Sec. 9, Clause 5, providing that in regulating commerce or revenue no preference shall be given to the ports of one state over those of another, again protecting commerce.

And yet, asserts the Tennessee Valley Authority, the Constitution has conferred the power to destroy the commerce of the states by the device of operating federal properties or instrumentalities not merely as instrumentalities for citizens to use in carrying on commerce, but in order to engage in manufacture and trade, in no sense in aid of their functioning as instrumentalities of commerce.

Speaking with reference to the Commerce clause, Madison in his letter to Cabell of February 13, 1829 (III Farrand 478), stated:

> "* * * it is very certain that it grew out of the abuse of the power by the importing states in taxing the nonimporting, and was intended as a negative and preventive provision against injustice among the states themselves, rather than a power to be used for the positive purpose of the general government."

Every remote government in the world inhabited by citizens on the frontier of civilization as well as those states whose people are losing the capacity for self-government, have reserved to themselves by their political organization, so long as they have retained a vestige of political freedom, the right to prevent dumping by foreign nations of commodities destructive of their commerce. Yet it is insisted upon this record that James Wilson and Gouverneur Morris, Madison and George Mason, the Pinckneys, and their colleagues, witlessly drafted an instrument which permitted the general government to select at will areas within state domain for dumping products to be manufactured and marketed in a proprietary capacity by the government of the United States and for the operation of a complete government monopoly.

The "power to regulate" commerce does not carry with it the right to destroy or impair those limitations and guaranties which are placed in the Constitution or in any of the amendments to that instrument. *Monongahela*

Navigation Co. v. United States, 148 U. S. 312; *U. S. v. Joint Traffic Association,* 171 U. S., at p. 571.

The Court has made it plain beyond possibility of further misconception that statutory declarations of a constitutional purpose or relationship and strained economic syllogisms are not to be permitted to enlarge ~~the~~ range of delegated power. *Hammer v. Dagenhart,* 247 U. S. 251 (276); *Linder v. U. S.,* 268 U. S. 446; *Panama Refining Co. v. Ryan,* 293 U. S. 632; *Schechter Poultry Co. v. United States,* 55 Sup. Ct. 837, 97 A. L. R. 947.

Under this necessity for a functional relation to the flow of interstate commerce, the Court has consistently excluded from the permitted scope of the commerce clause the business of production in its entirety and has held that production is exclusively within the domain of the powers reserved to the States and the people. *Utah Power & L. Co. v. Pfost,* supra, and cases cited at the beginning of this discussion.

The building or operation of a **commercial power unit** in a navigation dam (or alleged navigation dam), the building or ownership of which and the operation or non-operation of which could have not even a molecular effect on the movement of commerce on the Tennessee River, cannot be justified under the commerce clause.

The question whether the government, in impounding more water in a navigable stream than is necessary to be manipulated for navigation, which becomes therefore non-navigation water (that is, surplus water reverting to the State in trust for its people), can thereupon appropriate such water and make it the basis of a general manufacturing and marketing business, is not a question of navigation or of the commerce power. It does not warrant serious discussion under the commerce clause.

The defendant Morgan (II-406, 407), a hydraulic and flood control engineer, the unanimous testimony, and the findings of the Court (No. 106, II-1072), make plain that there is no physical or functional relationship between provision at navigation dams for commercial power and the commercial manufacture and sale of power, on the one hand, and the function of navigation on the other (Supra, p. 58).*

The amendment to the Act, admittedly introduced after the decree of the District Court herein to attempt to improve its constitutional basis by an even greater elaboration of recitals, resulted in the recasting of the commercial electricity clause (Sec. 5, supra). The testimony of the Chairman shows conclusively that the objective of the power program is revenue and social regeneration and in no sense of the word, navigation. There can be no pretense in this ex post facto justification that these provisions are in furtherance of the regulation of navigation.

Compare this contention of TVA with the precisely similar contention unsuccessfully advanced on behalf of the State of Illinois in *Wisconsin v. Illinois,* 278 U. S. 367, reported at page 396, upon the supposed authority of the first *Green Bay* Case, *infra*:

***The defendant A. E. Morgan stated that the only relationship was the question of revenue from commercial operations, that Congress and the Corps of Engineers had decided that the low dams represented their judgment as to what the United States can afford "if navigation alone is to be considered * * * and I believe I would concur with them * * * We could build navigation systems with no generating equipment at all and we would get the same quality of navigation as we would with generating facilities, but the development of electric power makes the construction of dams economically feasible, and that economic factor establishes the relationship between the power program and navigation" (II-406, 407) * * * "Besides contributing to the cost of the dams, the power could make possible a very much better social and economic condition for the region. That aspect is an essential part of the relationship of the power program to navigation, and it is in part on the social development of the region that our program is based. It is the general policy of the development of the region and its social value. So far as the generation, transmission and distribution of electric power is concerned, the principal factor is the economic relationship, plus desirable social objectives."**

> "The diversion is not for the purpose of sanitation only. It is also for the purposes of navigation and, even if we examine its purpose of sanitation alone, we shall find that authorization thereof for that purpose was and is a regulation necessary and reasonably related to the protection of both navigation and interstate commerce on land. The Secretary of War was justified, under the authority delegated to him, in considering the beneficial effect upon interstate commerce of preventing the pollution of the drinking water supply of Chicago. *Bartlett v. Lockwood,* 160 U. S. 357; *Hoke v. United States,* 227 U. S. 308; *New England Co. v. United States,* 144 Fed. 932; *Kaukauna Power Co. v. Green Bay,* 142 U. S. 254."

The phrase "to avoid the waste of water power" has no more constitutional significance than the phrase in the preamble or in the Executive Message of April 10, 1935, relating to the aspiration for the general welfare. Neither that phrase nor its companion, "to assist in the liquidation of the cost or aid in the maintenance of the projects of the Authority" add or detract anything from the decisive question whether the function of permanent commercial manufacture of electricity and permanent contractual utility operations in the Southeast is in furtherance of any constitutional function. There is no pretense in the lip service of the Amendment that avoiding the waste of water power or liquidation of the cost of the project is in any constitutional sense in furtherance of the regulation of navigation.

Congress may acquire the right under the treaty making power to regulate the taking of migratory birds, *Missouri v. Holland,* 252 U. S. 416, not otherwise enjoyed under the commerce clause or under any economic waste fantasy as to a federal proprietary right of capture, *U. S.*

v. McCullagh, 221 Fed. 288; *U. S. v. Shauver*, 214 Fed. 154. It has the right to manipulate water level and water flow in the regulation of navigation. *Wisconsin v. Illinois*, supra.

But this treaty power to regulate the citizen's business of hunting migratory birds, and the commerce power to regulate the transit of the waters useful for the regulation of navigation, confer no right whatever upon the government to take birds in their flight for the commercial market or appropriate the surplus waters of navigable rivers as the basis for a commercial business, either as an alleged incident to the power of regulation or in order to avoid some congressional conception of economic waste or to realize income (or deficits) for treasury purposes or for alleged social regeneration in the Tennessee Valley.

The power to regulate commerce (sufficiently analogous, subject to limitations, to the police power of the State) is not the power to engage in and monopolize the business or function regulated. *South Carolina v. United States*, *Helvering v. Ohio*, *Helvering v. Powers* (supra) point the fallacy in the argument that the Convention of 1787 gave to Congress the power to engage permanently in and therefore to monopolize commerce in any lawful commodity or product whatever, either to regulate interstate business in that commodity, or to assist in regulating or maintaining some other agency or means of commerce.

More than a century ago Chief Justice Marshall asserted that it would be hard to contend that Congress had the power to authorize a bank to carry on a general business if that business were not necessary to the proper functioning of the bank for the delegated national purpose (*Osborne v. Bank*, 9 Wheat. [22 U. S.] 738, 860 [1824]).

Any pretense that commercial production, commercial transmission or commercial sale of electricity is necessary to the functioning of the locks or the regulation of navigation is not only totally insubstantial, but it is repudiated by the terms of the Act and the organization of the Tennessee Valley Authority itself. The service of navigation is reserved to the Corps of Engineers [Section 5 (k), 7 (a)] which leaves all navigation features with the War Department.

It is to be noted that there is not any provision of this Act that deals in any respect whatever with the regulation of navigation or delegates to the Tennessee Valley Authority any function or responsibility or imposes upon it any duty as to navigation [except to deliver the trifling fragment of power necessary to actuate the locks to the War Department—Sec. 5 (k)]; but this act does, as we argue below in a different connection, confer absolute control over all waters on TVA and generates a sharp conflict between the function of navigation (flood control) and commercial commitment to power generation and distribution, which, as a matter of law, is inconsistent with the trust relationship of the government toward nagivation.

F.

The Contentions of TVA and the Basis of the Decision Announced by the Circuit Court of Appeals Cannot Be Reconciled With the Decisions of This Court as to the Rights of the State and Its Grantees in the Waters of Navigable Streams.

(1) That the States are inalienably vested with the full proprietary right in the banks, beds and waters of navigable streams, subject only to the power of the Federal Government to regulate navigation, has been settled by the decisions of this Court for generations:

Pollard's Lessee v. Hagan, 3 How. 212;

Shively v. Bowlby, 152 U. S. 1, 43;
Port of Seattle v. Oregon-Washington Ry., 255 U. S. 56;
Kansas v. Colorado, supra.

The latest expressions of this Court recognize the finality of the principle asserted:

United States v. Arizona, 55 Sup. Ct. 666, 79 L. ed. 681;
United States v. West Virginia, 79 L. ed. 848.

(2) There is nothing in the *Boulder Dam Case* (*Arizona v. California,* 283 U. S. 423), which in any respect, by decision or inference, can be regarded as modifying this settled principle. On the contrary, the only questions decided by that decision were that, as a matter of fact, the Colorado was navigable in such sense as to be subject to regulation by the construction of the dam at Boulder Canyon; that the structural design proposed was a matter for Congress to determine; that, accordingly, Arizona could not complain of what was being done at the time; and that, as to future threatened encroachments on the admitted rights of Arizona, the suit, filed five years before completion of the dam, was premature.

Far from adjudicating that the mere building of a navigation dam gave absolute control and disposition of all surplus waters by Congress, and divested all previous sovereign and proprietary rights of the State and its citizens, the Court expressly recognized the right of Arizona to relief if and when her admitted rights in and to the waters were infringed. The opinion cited with approval the opinion in *Kansas v. Colorado,* which stands as a mountain range against the contention and against the entire program of TVA.

The Colorado River Compact is an apt illustration of a statesmanlike method for disposing of the grave problems of apportionment of interests in a great interstate stream.

The Tennessee Valley Authority Act is not a compact based on the interest of the States most nearly concerned. It represents a fatal step away from interstate comity and the Constitution, in the unfolding of a relentless program to commit the government to federal operations of utility systems. The relationship to the State reflected in Section 13 (giving the State of Alabama a small percentage of the commercial revenue) is in itself an anomaly and is in violation of the Constitution itself.

The *Boulder Dam Case* plainly left open the orderly execution of the Compact as between the assenting States; a compact arrived at after due and careful conferences and after the most careful deliberation not only between the States themselves but with Congress. The effort, if not to the entire satisfaction of Arizona, clearly left her sovereign rights unfettered and justiciable. We understand the differences have been informally settled and will in due course be liquidated by agreement.

Had this Court adopted the theorem of TVA that the building of a navigation or flood control dam leaves the States without rights except to petition Congress as to the use of the surplus waters of their own streams, waters admittedly and by definition not necessary for any purpose of navigation, it would have dismissed the bill with prejudice and have admonished the State of Arizona to have recourse to Congress for the redress of its grievances.

(3) It was settled by the decision in *Pollard v. Hagan* that the States, in their capacity as proprietors in trust

for their citizens, can not by grant or treaty or waiver, divest themselves of this sovereign duty and responsibility even to the federal government or to any other grantee. *Mobile Transportation Co. v. City of Mobile*, 153 Ala. 409.

That which can not be accomplished directly and thus destroy a trust function, can not be accomplished by transitory acceptance by a State of the anomalous and terminable stipend prescribed by Section 13 of the TVA Act. If Alabama had essayed to yield to a federal commercial program, the federal government has no lawful power to undertake it.

Wisconsin v. Illinois,

278 U. S. 367.

The State of Illinois unsuccessfully contended, upon the supposed authority of *United States v. Chandler-Dunbar Water Power Company*, 229 U. S. 53, that the Constitution had transferred to the Government some *jus regium* in navigable waters. The contention was necessarily overruled in the adverse conclusion of the Court that regulation of navigation means regulation of navigation and not power and sanitation.

By like necessary result, that decision made plain that Congress may not for some non-navigational objective arbitrarily declare that what are plainly surplus waters are in fact waters necessary to be manipulated for navigation; and thereupon proceed to divert them to the power or sanitary or irrigation use of some licensee of the government, to whom the supposed right to receive them has been bartered; nor can the government itself put them to commercial use.

The strained inference that TVA seeks to place upon the *Chandler-Dunbar Case* was expressly negatived when this Court unanimously asserted

> "This Court has said that while Congress in the exercise of its power may adopt any means having some positive relation to the control of navigation and not otherwise inconsistent with the Constitution, *United States v. Chandler-Dunbar Co.*, 229 U. S. 53, 62, it may not arbitrarily destroy or impair the rights of riparian owners by legislation which has no real or substantial relation to the control of navigation or appropriateness to that end. *United States v. River Rouge Improvement Co.*, 269 U. S. 411, 419; *Port of Seattle v. Oregon & Washington R. R.*, 255 U. S. 56, 63" (278 U. S. at p. 415).

What the *Chandler-Dunbar Case* actually decided was that since Congress had determined that the entire stream must be kept open for navigation, the Company owning the bed could not insist that substantial value be placed, in a condemnation proceeding, upon a right which it could not exercise.

In issuing licenses for improvements in navigable streams, the War Department has in the main recognized the limitation upon its powers. See for instance the carefully limited expressions of the license to the Sanitary District in *Wisconsin v. Illinois**, and the equally careful provisions of the Federal Water Power Act and licenses under that Act.†

In brief, the decisions of this Court have settled beyond argument that the government has no proprietary or commodity right in the waters, that it has only a right of regulation within bounds that must be related to navigation and not arbitrary, *Wisconsin v. Illinois, supra;* within bounds that respect the Fifth Amendment, *Monongahela Navigation Co. v. U. S., supra;* and the Tenth, *Kansas v. Colorado, supra.*

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*". . . the instrument did not give any property rights either in real estate or material, or any exclusive privileges; and that it did not authorize any injury to private property or invasion of private rights, or any infringement of state or local laws or regulations, or obviate the necessity of obtaining the State's assent to the work authorized." (278 U. S. at p. 406).

†41 Stat. 1063, Sec. 16; 16 U. S. C. 809.

The Green Bay ("Surplus Water") Cases.

(a) *Kaukauna Water Co. v. Green Bay Canal Co.,* 142 U. S. 254.

(b) *Green Bay Canal Co. v. Patten Paper Co.,* 172 U. S. 58 (173 U. S. 179).

The basic facts in these two cases are substantially the same.

On admission of Wisconsin as a State the Government by Act of August 8, 1846, 9 Stat. 83, C. 170, granted certain lands to the State for the purpose of improving the Fox and Wisconsin Rivers. The Fox is a navigable stream affording water power.

The legislature accepted the grant by Act of June 29, 1848 (Laws, p. 58) and by subsequent Act approved August 8, 1848, created a board of public works to undertake the improvement, by that Act providing that

> "Whenever a water power shall be created by reason of any dam erected or other improvement made on any of said rivers, such water power shall belong to the State, subject to the future action of the legislature." (142 U. S. at p. 257).

This attribute was declared and contemplated to be a public purpose both by the Statute in question and under an express provision of the Constitution of Wisconsin.*

By Act of February 9, 1850, the State authorized grant of the "whole or part of such water power" in payment upon the cost of improvement (172 U. S. at p. 71).

Apparently at the time of the decision of the first case the question of the right of the States to lease or dispose of, or, indeed, to operate business public in character was in doubt. The cases of *Jones v. Portland,* 245 U. S. 217; *Green v. Frazier,* 253 U. S. 233; *Puget Sound L. & P. Co. v. Seattle,* 291 U. S. 619, came much later, and the power to make leases of water rights had been generally ascribed *and limited* both in State courts and in this Court to the period of canal operations which had produced the head (142 U. S. at p. 275, citing *Fox v. Cincinnati,* 104 U. S. 783, q. v.); the assumption apparently being that the State could have no proprietary right in the matter other than as directly related to and concurrent with the navigation improvement. In view of the Article of the Wisconsin Constitution and the decisions of this Court recognizing that proprietary business of a public nature may be undertaken by the State as its own people may determine, it does not appear that the question of the acquisition and subsequent disposition by the State of the water rights should have given as much trouble as it did. Certainly the so-called incidental relationship of power development to navigation was a much more essential factor in determining what was a public use as to power than it could be today; and, then or now, as to the federal government it is incredible that commercial operation of power units (necessarily dependent upon preemption of surplus waters in an abuse of regulation of navigation, for continuity of service) is not only not a function but is a violation and perversion of the Commerce Clause.

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*Art. VIII. "Sec. 10. The State shall never contract any debt for works of internal improvement or be a party carrying on such works; but whenever grants of land or other property shall have been made to the State, especially dedicated by the grant to particular works of internal improvement, the State may carry on such particular works, and shall devote thereto the avails of such grants, and may pledge or appropriate the revenues derived from such works in aid of their completion" (172 U. S. at p. 71).

The question (and doubt) in the *Kaukauna Case* as to the right of the State to condemn arose out of the fact that prior to the conveyance to the State there had been previous entries and patents under which rights had vested in riparian owners (which extend, under the law of Wisconsin, to the center of the bed of the stream).

When, accordingly, the dam and an embankment were subsequently constructed under authority of the State, in part upon the abutting upland and bed of this riparian owner,

> "There is no doubt, under the facts of this case, that the owner of lot 5 was entitled to compensation * * *. To what extent he was entitled to the use of the water power created by the dam, * * * may be difficult of ascertainment, depending as it does largely upon the number of proprietors, the width and depth of the river, the volume of the water, the amount of fall, and the character of the manufactures to which it was applicable. Nor is it necessary to answer the question in this case, since it appears that, whatever this property is, it has been appropriated and no provision made for the compensation of the owner" (142 U. S. at p. 272).

Thus it is seen that the Court did not decide that by building a dam, the state acquires or displaces riparian rights. This is an express recognition that the dam did not create the flow of the stream or divest the riparians of any right whatever. If it had, there would have been no necessity for a taking of the water rights.

The question of the adequacy of the subsequent provision for compensation and the right of the state to take all rights in the pool were the only questions in the case, not the extent of the rights.

> "The only question involved in this case proper for us to consider, is whether the act of the legislature of Wisconsin of August 8, 1848, reserving to the State the water power created by the erection of the dam over the Fox River, as construed by the Supreme Court of the State, and the proceedings thereunder, operated to deprive the plaintiffs in error of their property without due process of law" (142 U. S. at p. 269).

The attack on the validity of the taking was on two grounds, that the taking, having been with a view to lease or sale for industrial (non-public) use was in effect for a private purpose and could not be exerted without violation of the Fourteenth Amendment, which had been adopted before the final construction or relocation of the improvement. The Court held that the Fourteenth Amendment had not been violated and then passed to a consideration of the question whether compensation had been provided.

The state project had failed, been foreclosed and after successive vicissitudes Congress elected to take over the service of navigation. By Act of July 7, 1870, it authorized appraisal and purchase of so much of the property of the then owner, including locks, dams, canals and franchises, as were deemed to be necessary for navigation (172 U. S. 61). The Secretary recommended that the government take the works of improvement and not the water rights. Congress accordingly by Act approved June 10, 1872, made the necessary appropriation and the Green Bay Company (the owner) conveyed and granted all of the property, including locks, dams, canals and franchises

> "**saving and excepting therefrom, and reserving** to the said company, the following described property, rights and portion of franchises which, in the opinion of the Secretary of War and of Congress, are not needed for public use, to wit: * * * Second. Also all that part of the franchise of said company, viz., the water powers created by the dams and by the use of the surplus water not required for the purpose of navigation, with the rights of protection and preservation appurtenant thereto." (172 U. S., pp. 62-63).

The State of Wisconsin had not provided compensation to the riparians for the taking of their land or water rights, but Congress in providing for the purchase made provision to that end by the Act of March 3, 1875 (18 Stat. 506, c. 166, Sec. 1, quoted in 142 U. S. at p. 259). The Court, proceeding to consider the question of this provision for compensation, summarized its conclusion as to the elements of compensation which should be provided for:

> "Inasmuch as the dam abuts upon this lot, its owner was doubtless entitled to compensation for the land occupied by the dam and embankment, as well as for the value of the use of the water diverted from its natural course" (142 U. S. at p. 277).

Note that this is a decisive conclusion that construction of a navigation dam under license from Congress did not by virtue of the creation of the water head, transfer any right whatever from the riparian owners to the creator of the dam. Those rights had to be condemned.

TVA is basing a billion dollar monopolistic program of commercial operation [approximately $300,000,000 for the first unit, in a five year program (Morgan, II-419, 420)] on a supposed right to monopolize all surplus flow of the stream by perverting the Commerce Clause to that end.

The Court reached the conclusion that the Act of 1875 (18 Stat. 506) held open its provision for compensation to the riparians whose property had been taken, and was an assumption of the obligation of the State and its successors to that end.

> "It is true that this act, after remaining in force about thirteen years, seems to have been repealed by the deficiency bill of 1888, 25 Stat. 4, 21, * * *. Congress was not obliged to keep the act of 1875 in operation forever, and reasonable opportunity having been afforded to the plaintiffs in error to obtain compensation for the damages sustained by the construction of the improvement, we think they must be deemed to have waived their right to them" (142 U. S., pp. 279-280). * * *
>
> "Under the circumstances of this case we do not think it was within the power of the owner of lot 5, after acquiescing for over twenty-five years in the construction of the dam, and the exclusive appropriation of the water by the State, to treat their proceedings as a nullity, and take such action as could only be justified upon the theory that the State and the Canal Company had acquired no rights by its long silence" (142 U. S. at p. 281).

On these facts, all that this case decided or could properly have decided was

(1) That the State of Wisconsin had the right and had exercised the right, as part of a projected work of internal improvement of navigation, to acquire by condemnation all proprietary rights of all riparians on the pool, in lands or water rights affected.

(2) That Congress, in order to acquire a long established improvement of navigation, which had been accompanied by an actual taking of all proprietary water rights along the pool, could and had made provision to assume payment of compensation of those who had not been paid by the State or its grantees at the time of the original taking.

There was no question of operation by Congress and the case is of no value as a precedent or authority in this proceeding.

That it constitutes the sole basis for this gigantic proposal which fourteen government counsel could devise or which the Circuit Court of Appeals could discover, on submission to that court is significant enough.

It is precisely the effort to lift a state function into a national program (the New York Power Authority idea) which led the Administration into the web which Senator Norris has been spinning these many years.

Second Green Bay Case (Green Bay Canal Co. v. Patten Paper Co., 172 U. S. 58; on rehearing, 173 U. S. 179).

This was a suit by riparian (and river bed) owners below the dam mentioned in the first case, for a decree to protect their right to have an apportionment of the flow of the surplus waters of the river over their property, as between other channels.

The Green Bay Company, a defendant, asserted the right to have any decree respect its claim of right to use all of the "water power created by the government dam and improvements" (172 U. S. at p. 59), by virtue of the arrangement under which it had sold the navigation improvement to the government and had reserved all rights to utilize water power at the dam.

In this case the Court held that the sale to the United States, accompanied by the reservation of the right to use the water for power, was in effect a sale of the entire property and rights to the government, which by that action became vested with

> "absolute ownership in the improvement and appurtenances * * *, which proprietary rights became added to the jurisdiction and control that the United States possessed over the Fox River as a navigable water" (172 U. S. at p. 79).

This fiction of sale and reconveyance is emphasized elaborately in the opinion as a basis for the federal question asserted. It is accordingly not of any importance here. Whether (aside from the question whether the federal statute had authorized compensation) the Green Bay Company acquired its proprietary title by reservation or reconveyance, there was no doubt that it held that title and the Court proceeded to hold that "at what points in the dam and canal the water for power may be withdrawn, and the quantity which can be treated as surplus with due regard to navigation" were matters to be determined by the United States. An obvious conclusion when positively related to commerce, but, as we have seen, it is subject to the limitations above stated, which in *Wisconsin v. Illinois* was drawn by decree against a diversion of water not for navigation, but to dispose of sewage and produce electricity.

On the application for rehearing (173 U. S. 179) the Court but restated the too broad suggestion of control of surplus waters under the guise of the commerce clause, which had been implied in the principal opinion (172 U. S., at p. 80), but was not necessary to decision as the Green Bay Company had been held to have acquired all water rights at and above the dam.

It cannot be doubted that this unnecessary suggestion of the Court, as manifest from the opinion, was based upon cases involving a conflict of state and federal jurisdiction in respect to which, when Congress has lawfully acted, there "can be no divided empire."

There can and must be divided waters among those who are entitled to them after every legitimate concern of commerce is satisfied.

Any implications to the contrary have been repudiated in *Wisconsin v. Illinois,* and are wholly inconsistent with *International Paper Co. v. U. S., Bailey v. Drexel Furniture Co.,* and other cases cited, infra.

Singularly enough the Court, on the rehearing, asserted that it would not presume that the authorities of the United States "will either permit or make changes in the places where the surplus waters are to be used * * * so as to deprive other parties of the water powers they have been using for so many years unless such changes are found to be necessary and proper" * * *.

This admission is sufficient to show that the right of the Green Bay Company above the dam was predicated on the proprietary rights which it had acquired, rather than on any intention to suggest a right under the commerce clause.

The Extraordinary Contention and Program of the Tennessee Valley Authority Cannot Be Sustained Under the Green Bay Cases.

Here we have the assertion of colossal power, the most extensive and far reaching in its permanent implications ever asserted by any American administration. This revolution is predicated upon little more than a play on words, lifted from their context in decisions which really involved the question of State power to engage in operating a "work of internal improvement." It is now sought to be applied to the federal government and expanded in its first gesture into a potential and inevitable monopoly of power supply in fourteen states. No sanction for any such elephantiasis of function can be found in the Commerce Clause or in the *Green Bay Cases*.

Aside from the analysis we have made of these cases, the function of the State is the antithesis of federal function. As *Jones v. Portland* and the other cases, supra, have demonstrated, no incidental purposes or fictions were necessary to sustain the power of the people of the State of Wisconsin to authorize a work of public improvement on any public account, such as making available power for industry. The making of that state improvement required no fiction to sustain it. Unmistakably initiated in good faith and meeting difficulties, the project could be and was sold.

The federal government has no such relation of *parens patriae*.

The suggestion that this vast economic program of overproduction, carrying the necessary result of federal monopoly and displacement of state function and function of industry, was or could have been remotely in the mind of the Court in deciding the Green Bay Cases is a futile suggestion. The Court did not have before it any question of the Tenth Amendment or of violation of federal function or perversion of the Commerce Clause.

The evidence shows inevitable monopoly of power production by TVA in the valley. By reason of this systematic multiplication of plants and the extraordinary extent of the plan and its declared and undoubted implications, there is the impact of a multitude and under and behind it all, in one integrated and inseparable whole, the design to accomplish a regionwide result. To speak of that overwhelming and intended combination of forces as simple and isolated incidents to the construction of each particular dam or steam-plant is distortion, not argument. The principle of *American Bank and Trust Company v. Federal Reserve Bank of Atlanta, supra,* applies.

G.

There Is a Clear Distortion of Function in the Effort of TVA to Superimpose a Claim of Power as to Incidental Non-Federal Commercial Activities on the Regulation of Navigation.

1) The Tennessee Valley Authority is not justified in urging this Court to assert on this record that improvement for navigation, or for alleged headwater storage of a stream having great and increasing value as a power stream and diminishing importance for inland navigation, authorizes the federal government to extract for commercial sale all of the water power from the stream without rendering just compensation to the owners.* *Pollard v. Hagan, Kaukauna Water Power Co. v. Green Bay & Mississippi Canal Co., Monongahela Navigation Co. v. United States, supra.*

In support of this, it is sufficient to refer to *Brown v. U. S.,* 263 U. S. 78-83, by Taft, C. J.:

> "Our conclusion is not in conflict with the class of cases with which the Justices of the Supreme Judicial Court of Massachusetts dealt in the *Opinion of Justices,* 204 Mass. 607. It was there proposed that the City of Boston, in building a street through a crowded part of the city, should be given power to condemn lots abutting on both sides of the proposed street with a view to sale of them after the improvement was

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*even if the federal government is authorized to acquire proprietary rights in waters for non-federal use; which most distinctly it is not.

made, for the promotion of the erection of warehouses, mercantile establishments and other buildings suited to the demands of trade and commerce. The Justices were of opinion that neither the development of the private commerce of the city nor the incidental profit which might enure to the city out of such a procedure could constitute a public use authorizing condemnation. **The distinction between that case and this is that here we find that the removal of the town is a necessary step in the public improvement itself and is not sought to be justified only as a way for the United States to reduce the cost of the improvement by an outside land speculation.**''

2) On this record TVA is not warranted in asking this court to establish a precedent, without any State represented at bar, that would transfer permanently to the federal government proprietary rights to extract the water power from every navigable and headwater stream in the United States for commercial sale and strip them of their value to the States.

3) No such result can be rationally supported on the decisions. If so amazing a result were announced, it could not possibly be accompanied by a finding that, having acquired any such proprietary right, or having established any such ouster of the inherent rights of the States, the government could make use of the right or commodity, or easement or whatever term might be given it, for the purpose thereupon of entering into a permanent manufacturing business at its proposed series of extraction dams.

4) In constructing a dam, the government does not create water. It merely concentrates water. The water and the potential power is a natural incident of the stream. The dam merely concentrates and makes it available for recovery or use. The government, in improving a stream

for navigation, has no right to recapture all incidental benefits without condemnation; such as by assessing the supposed benefits against the riparian owners or against the state, by seizing their surplus water.

5) The government is under no obligation to improve a stream by raising the water level, but if it does so, it must do that work to improve navigation and not in order thereupon to recapture the benefits of the higher pool or head resulting to the owners of the pool. The riparian owner takes his chances of consequential damages and is entitled to his chance of consequential benefits. The government has no right to seize the one, and is under no duty to pay the other. There is no safe or lawful ground except for the government to restrict itself to the function of navigation and permit the States and the citizens to pursue their domestic affairs under the Tenth Amendment without intermeddling by the federal government.

6) What the TVA proposes is to improve the stream and assess the cost against riparians by taking (in the pretense of controlling for navigation) their right to their fair proportion of surplus waters not required for navigation. This is a clear violation of the Fifth Amendment. As it takes water rights (held necessary to be condemned in the *Kaukauna Case*) without condemnation and would be contrary to *Monongahela Navigation Co. v. United States.*

7) The Federal Government can under no circumstances condemn riparian rights in surplus water solely for the fiscal purpose of using those rights to engage in manufacturing.

8) There is nothing in the tax clause to authorize the government to levy taxes in order to condemn water rights

in order to provide for the general welfare by going into the commercial manufacturing business. The Tenth Amendment and the test laid down by Chief Justice Marshall forbid that endeavor and the entire conception of the Tennessee Valley Authority to the contrary constitutes a plain violation of federal function.

H.

Active Participation by the Government in the Control of the Proposed Defendant Municipal Systems and Its Proven Objective in Financing the Systems Renders the Proposed Investments Dynamic and Illegal, Without Reference to Their Intrinsic Invalidity as Appropriations for Non-federal Purposes.

The proposed financing by the government of competitive distribution systems in the defendant towns* is illegal because of (a) the government's complete financing of the project and its sole beneficial ownership in the active project at the outset, and permanently unless it earns enough under the sub-normal rates announced to liquidate the investment; (b) the absence of any pecuniary liability or obligation upon or investment by the towns (Statement, supra, p. 44 et seq.), and the government's substantial participation in control over rates and other characteristics of management and operation; (c) the stated objective of these investments, referred to elsewhere, viz., furthering the TVA program and supplying

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*Either under color of National Industrial Recovery Act (48 Stat. 195) or the Emergency Relief Appropriation Act of 1935 (Pub. Res. No. 11, 74th Cong.) or by direct action by TVA under color of the original act or the amendment (Secs. 7 and 9 of the amendment) purporting to authorize $50,000,000 of United States bonds to aid in the acquisition of distribution systems for states, municipalities, counties and non-profit organizations "to facilitate the disposition of the surplus power of the Corporation."

TVA with a local distributing agency, and establishing throughout the nation power yardsticks; all constituting clear transgressions of the function and spirit of the Tenth Amendment.

For the reason that these accompanying circumstances are so clearly established on the record, we do not feel warranted in arguing at length what we conceive to be the illegality of the investments, *per se*, because (i) not in furtherance of any delegation of power to the federal government, and (ii) because of intrinsic transgression of and inconsistency with the Tenth Amendment.

Petitioners contend that the general welfare provision in the tax clause is not an extension of the power of appropriation beyond the scope of the expressly delegated functions, as was argued by counsel for the government, appearing in the District Court on behalf of Harold L. Ickes as Federal Emergency Administrator of Public Works as amicus curiae (9 F. Supp. 800). We set out here a bare outline of the reasons for this underlying conclusion and, next following, proceed to the discussion of the invalidity of these allotted and imminently threatened investments because of direct participation by the government in the operation.

1. **The Federal Government can not make appropriations and investments for purposes which are beyond its power of affirmative action.**

The complete documentation of this subject, the acceptance of the statement, made as of course, in Gibbons v. Ogden, 9 Wheat., at 199, that

> "Congress is not empowered to tax for those purposes which are within the exclusive province of the States,"

the executive interpretation, the forbearance of the people in yielding without resistance to unauthorized appropriations where they have not evinced a systematic intent to undermine the economic stability of the nation or the Tenth Amendment or have indeed escaped under the doctrine of *Massachusetts v. Mellon,* and the mechanical necessity that acts of the government under color of law not resulting in justiciable injury to the citizen should not be laid open to litigious pests (cf. *The Siren,* per Justice Field, *infra*); all these considerations have been laid before this Court with conspicuous ability and accuracy. We could but retrace their documentation, in this brief upon the validity of a march upon the Constitution from another flank. We therefore condense our comment on this question to the aspect in which it is peculiarly involved on this record.

No power to make investments for non-federal purposes appears to be predicated by the government on the general welfare clause in the preamble to the Constitution (*Jacobson v. Massachusetts,* 197 U. S. 22; *Dorr v. U. S.,* 195 U. S. 140).

Reliance is upon the substantially identical phrases "common defense" and "general welfare" and from the same source, in the tax clause (Article I, Section 8, Clause 1).

It is difficult to conceive that if the interpretation of the general welfare provision had come on for determination shortly after ratification, upon a proposal for an eighteenth century equivalent of the Administration's nation-wide electrification program shown on this record, to be made from loans and treasury deficits of a staggering nation, there could be any doubt that the power of appropriation for such wholly non-federal purposes would have been so universally known to have been foreign to the intent of the Convention and the ratifying states as to compel a prompt rejection.

After all, and notwithstanding the years, it is the language of the Constitution, and its intent when adopted, which the Court must interpret. We venture the assertion that, even as *res integra* and without the inexorable history of the clause in the Convention to force the same conclusion, the phrase "common defense and general welfare" appearing in the tax power at the head of a section enumerating the limited functions of the federal government, could not be regarded as other than comprehensive terms to extend the taxing power to the range of expressly delegated functions, which alone the Convention had undertaken to entrust to the general government.

The familiar history of the phraseology,* lifted out of the old Articles and plainly referable to the debts "contracted in the common defense" leaves Madison's account of the evolution of the clause documented beyond reasonable dispute.

It is difficult to see how the same or similar clause in the preamble, lifted later in the proceedings from the old Articles and in the preamble long recognized as confer-

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*See proceedings of the convention for August 31, September 4, **Madison's Debates**, 502, 507, 508. III **Farrand, Records** of the Federal Convention, 483-494; **Charles Warren, The Making of the Constitution**, 464-475; **Tucker**, Judge Story's position on the So-called General Welfare Clauses, 13 Amer. Bar Ass'n Journal (July, August, 1927); Federalist Papers, No. 41; **Alber's** Our National Constitution, 9 Boston Law Review, 152, 156-7; **Madison's** letter to Stevenson of Nov. 27, 1830 (Writings, Hunt Ed. VI: 356-7; IX: 411-31); Messages of Mar. 3d, 1817 and May 4, 1822; **Jefferson**, Opinion on the Bank of the United States, Feb. 15, 1791; letter to Judge Spencer Roane, Oct. 12, 1815 (Ford Ed. VI: 199; XI: 489-90); **James Wilson**, (Andrews Ed. II: 56-9) **Cooley** on Taxation (2d Ed., p. 110), and Const. Lim. (pp. 11, 106); **John C. Calhoun** (Vol. III: 36, 37, 41); **Hare**, American Constitutional Law (I: 242-3); Duer, Constitutional Jurisprudence (2d Ed., p. 211); **Willoughby** on the Constitution (I: 40; 2d Ed., p. 97); **Van Holst**, Constitutional Law of the United States (p. 118): the Message of **President Cleveland** in 1887, vetoing the appropriations for drouth-stricken counties in Texas; and **President Coolidge's** address before the Budget Meeting on Jan. 21, 1924, and in his Annual Message of Dec. 8, 1925.

ring no affirmative power, can be regarded when employed in this slightly different context in view of their historic relation to the assumption of the debts then recently incurred in the common defense, as having any such significance as is contended by those urging an unlimited spending power; particularly in view of the mandate of the people by the adoption of the Tenth Amendment that unlimited functions should not be open to implication. Hamilton did not during the period in which the Tenth Amendment was pending, nor during the period of ratification of the Constitution, give expression to the theory first asserted publicly in his Report on Manufactures (December 5, 1791) when the necessary number of states had already ratified the Tenth Amendment. So the Constitution was ratified with Madison's interpretation alone before the people.

No one could have supposed in that day that taxation and spending were substantive ends of government. The theory of redistribution through taxation has only recently been evolved. *Loan Association v. Topeka,* 87 U. S. (20 Wall.) 655; *Parkersburg v. Brown,* 106 U. S. 487; *Cole v. La Grange,* 113 U. S. 1, 9; *Green v. Frazier,* 253 U. S. 233; *Dodge v. Mission Township,* 107 Fed. 821; *Lowell v. Boston,* 111 Mass. 454.

The delegates were men of the most finished discrimination in the use of words. It is not credible that they would have left out of the clause relating to the means by which powers are to be made effective a provision adequate to embrace the financing of all those powers, as is accomplished by the general welfare provision, or, on the other hand. that they would have included, in a clause relating solely to the raising of revenue for all functions of government, a power provision so broad as to make the subsequent enumeration of powers useless and to undermine the organic theory of federal limitation. Any such jumbling of ideas was impossible with those in charge of the order and harmony of the document.

If the phrase common defense and general welfare was not intended as an impressive summary of the enumerated functions, why restate below less inclusive terms descriptive of national defense, and limit appropriations for the most exigent of all necessities of the government, preparation for the national defense, to two years:

> "To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than Two years" (Art. I, Sec. 8, Cl. 12),

if, as contended by the free spending school and the Tennessee Valley Authority, Congress could and has committed itself to an eternal program?

A pledge of property or the undertaking of a project which must be nursed with continuing appropriations in order to prevent the loss of all that has gone before is, in spirit, a blind appropriation at the outset. *In re Opinion of Justices* (Ala.), infra.

It seems obvious that the Convention would not have excluded, by the subsequent enumeration, the power of affirmative federal **action** beyond the boundaries delegated while at the same time inviting the **expenditure** of the national funds beyond those boundaries, the functional results of which the federal government could not control. The panic to find some insolvent to assume paternity for Passamaquoddy illustrates this illogical cleavage between appropriation and objective function, if, indeed, the government has, under the welfare clause, acquired the right to tax or spend for purposes which it may not execute.

If that is to be the construction (it being admitted, as we understand it, even by those who contend for an unlimited spending power, viz., that it does not extend the affirmative functions of action), it is an anomaly in any federal government in the world.

The phrase cannot be construed as carrying the power to tax and spend (or its exact equivalent of permanent commitment and risk shown on this record) without limit for public purposes, without involving vast new anomalies, twilight zones of confusion and doubt to plague Congress and this Court, greater within the federal sphere than have ever existed as between the state and federal governments.

Organically, there would in such case be two opposing theories in the federal government; one organized to emphasize the spending power with no responsibility to follow through; one organized to legislate and execute with full responsibility, within a strictly limited sphere; with a constant drag of the spending circle against the legislative circle. One centrifugal; the other orbital. As under Gresham's law a base metal tends to drive out the more valuable, an unlimited spending power which washes its hands of results must inevitably demoralize the spirit of restraint that tends to economy and simplicity of function.

It is not possible to reconcile the view of Hamilton on this clause, expressed after his views had been decisively and permanently voted down, with the accepted theory of the federal government.

His own conscious recognition of the necessity for limitation and the complete inadequacy of the one he suggested, alone demonstrates the untenable character of his position.

The Hamiltonian limitation was proposed with his tongue in his cheek. He desired the power, let the Constitution take care of itself.

Express Rejection of the General Welfare Clause as a Power.

In our analysis of the property clause we have called attention to the fact of the rejection by the Convention of the Article proposed on August 22 by the Committee of Detail which would have conferred upon Congress the extraordinary power

> "to provide, as may become necessary, from time to time, for the well managing and securing the property and general interests and welfare of the United States in such manner as shall not interfere with the governments of individual States, in matters which respect only their internal police, or for which their individual authorities may be competent."

Here, indeed, was a general welfare clause stated in terms of affirmative power, and it was rejected *(supra)*.

The traditional form of our government cannot survive if the welfare clause be given the meaning contended for by the government in establishing its plethora of yardsticks, all springing from the Tennessee Valley conception.

How can an interpretation be accepted that would, under the basic test of power laid down in *McCulloch v. Maryland*, that any action must consist with the letter and spirit, leave the Constitution stripped of harmony and consistency, half fish and half fowl? Appropriations that in fact displace state functions, that in fact, even without further federal participation, regulate local matters and destroy local industries by direct impact, do not consist with the spirit of the Constitution, a test, it must be remembered, which Chief Justice Marshall deliberately added to Hamilton's too broad test of power and has stood unchallenged for over a century.

Assured of the certainty that the general words "common defense and general welfare" have been attempted to be dragged out of their context by pressure of transitory legislative expediency, and that when they come on for necessary interpretation by this Court they will be declared to be in harmony with the theory of the Constitution, of delegated supreme national authority within the enumerated functions and none beyond, we return to our contention as to the patent invalidity of these loans under their cumulative defects, even were the doctrine of unlimited spending power accepted.

2. It can not be contended that the general welfare provision in the tax clause is a grant of power of affirmative action as to nondelegated functions.

Whatever be the conclusion as to the scope of the general welfare provision in the tax clause, there is no opinion deserving consideration which supports the contention that the spending power authorizes Congress to follow the appropriation and engage or participate in non-delegated functions by means of the instrumentality created by the appropriation. It is sufficient to refer to representative opinions, widely separated in time, representative of the sources which have not accepted Madison's interpretation as to the limitation on the power to appropriate in the first instance, but do concede that the welfare clause does not go beyond the appropriation.

> "Congress may not, indeed, engage in such undertakings merely because they are internal improvements for the general welfare, unless they fall within the scope of the enumerated powers." 2 Story, Com-

mentaries on the Constitution of the United States, 153-154.

We excerpt the following from the opinion of the Circuit Court of Appeals (8th) on rehearing in *Kansas Gas and Electric Co. v. City of Independence,* November 7, 1935:

> "But since the function of the general welfare clause is solely to limit, it grants no power, and when taxes have been laid and collected and the money appropriated the taxing power is exhausted. Therefore, the Congress may not enact legislation to promote the general welfare, except within the compass of the powers granted expressly, or by necessary implication by the provisions of Section 8 of Art. I of the Constitution which follow the provision giving the power to lay and collect taxes. It may only levy and collect taxes and appropriate the monies raised for the general welfare. It may not, in addition to laying and collecting a tax and appropriating the monies raised to provide for the general welfare, authorize or direct action, to promote the general welfare, by a federal agency or instrumentality, which would encroach on the reserved powers of the states.'"*

And see

1 Willoughby, The Constitutional Law of the United States, 2nd Ed., Sec. 61, pp. 97-98 (1929);

Burdick, The Law of the American Constitution, 181 (1922).

***The opinion quotes from Jefferson (correspondence 524-25), where he asserted, in his opinion on the Bank of the United States, referring to the power of Congress:**

"* * * Congress are not to lay taxes ad libitum, for any purpose they please; but only to pay the debts, or provide for the welfare of the Union. In like manner they are not to do anything they please, to provide for the general welfare; but only to lay taxes for that purpose. To consider the latter phrase, not as describing the purpose of the first, but as giving a distinct and independent power to do any act they please, which might be for the good of the Union, would render all the preceding and subsequent enumerations of power completely useless."

Madison's view and the impressive, in our opinion the conclusive, weight it merits in the interpretation of the clause, is discussed above. There appears so little warrant for regarding any possible contention that the power of Congress extends, under the tax clause, beyond the appropriation and into the field of action or control, that we do not feel justified in further reference.

The Proposed Federal Investments Involved in This Case Are Invalid.

The proposed investments run counter to this limitation in these respects (see statement, supra, p. 44 et seq.):

1) They are admitted to be accompanied, under the TVA power supply contracts, by participation in the resulting transmission and distribution [II-543, sub.-div. (a)].

2) They are no-recourse loans, under which the municipality incurs no pecuniary obligation. The government is the sole investor—the sole beneficial owner and lien holder. Operations are in fact at government risk and for government account.

3) The loans are made both for the express purpose of furthering TVA operations and to further the national program of establishing "yardsticks" over the country.

The actuality of government operation under such circumstances is fairly illustrated by the cases distinguishing, in determining liability for the federal corporation tax for "doing business," between the bare lease by a corporation which reserves no control or management in respect of the property leased and a lease which reserves to the lessor active domination of or control over the management of the leased property and is held to constitute doing business. *Zonne v. Minneapolis Syndicate* (supra), 220 U. S. 187; *Von Baumbach v. Sargent Land Co.* (supra), 242 U. S.

503; cf. *Colonial Trust Co. v. Montevallo Brick Co.*, 172 Fed. 310; *Ex Parte Heinekamp Motor Co. v. The Ford Motor Co.*, 24 Fed. (2nd) 861.

In *Edwards v. Chile Copper Company*, 270 U. S. 452, the court held that a proprietary corporation organized and functioning for the purpose of financing an operating company and furnishing from time to time funds to the other to enable it to carry on its work, maintaining accounting records and an office to continue these activities, was doing business subject to tax. The court, speaking of the relation of the proprietary company to the operating company, asserted:

> "It was its brain or at least the efferent nerve without which that company could not move. The plaintiff owned and by indirection governed it, and was its continuing support, by advances from time to time in the plaintiff's discretion. There was some suggestion that there was only one business and therefore ought to be only one tax. But if the one business could not be carried on without two corporations taking part in it, each must pay, by the plain words of the Act." ib. 456.

As we have seen these competitive so-called municipal systems in Alabama are no-recourse, straw agencies for the federal objective. The business could not be initiated in germ without the government. The government is not only its brain and its efferent nerve but the sole investor, the rate maker, the dictator of utility policy, corporation accounting and reserves, with a lien upon all reserves. This is not a case of Jacob and Esau. It is both the hairy arm and the voice of the government.

In this situation, the announcement of principle made by this Court in *American Bank and Trust Co. v. Federal*

Reserve Bank, 256 U. S. 350, conclusive as it is on the violation of the rules of fair play by TVA elsewhere discussed in this argument, is no less conclusive upon the fact that the dominant purpose of an expenditure may establish its illegality:

> "Most rights are qualified. A man has at least as absolute a right to give his own money as he has to demand money from a party that has made no promise to him; yet if he gives it to induce another to steal or murder the purpose of the act makes it a crime." id., p. 359.

On the facts of this record the so-called federal loans are not mere appropriations. They are dynamic investments, directed and controlled to a non-federal objective. They are in furtherance of TVA's conception of a series of public ownership distribution units controlled by TVA (Statement, supra, p. 21 et seq.).

II.

WHERE THE DOMINANT OBJECTIVE OF AN ACT OF CONGRESS OR AN ADMINISTRATIVE PROGRAM UNDERTAKEN BY THE FEDERAL GOVERNMENT IS TO REGULATE OR CONTROL MATTERS RESERVED BY THE NINTH AND TENTH AMENDMENTS, THE ACT OR TRANSACTION IS ILLEGAL.

The record in this case, the findings of fact made by the District Court not in any respect modified by the Circuit Court of Appeals, and the consistent and unqualified admissions in the record, excerpted from the corporate minutes and official releases of TVA, make plain that the dominant and primary purpose of the TVA program was and is the establishment of a permanent, independent utility network in state domain as a yardstick over or to regulate utilities, to supplement and in fact to displace state regulation and to promote public or co-operative ownership. All overt acts and transactions were plainly designed to that end, and to drive out existing utilities as a designed or proximate and necessary result.

It is a matter of daily accretion to the common and judicial knowledge in the region that the government is pressing relentlessly that result. With the lines closing in on the Birmingham area, on Chattanooga, on Memphis, on Knoxville, the march on regulated investment by an unregulated agency of the federal government presses on.

On this record, there can be no dispute that this program is and always has been a power program.

Were it navigation, the Corps of Engineers would be in charge.

Were it war, the War Department would be permitted to discharge its statutory duties.

It is neither. Neither the District Court nor the Circuit Court of Appeals were misled by the obvious pretense of a true function, a pretense adequately characterized in *International Paper Co. v. U. S.,* 252 U. S. 399. As stated by the Tennessee Valley Authority, its conception was and is that the Act definitely puts the government in the business of rendering electric service (II-624; supra, p. 21).

In the condensed approval by the Circuit Court of Appeals of the findings of the District Court (Record, p. 1305) it is stated:

> "Its (TVA'S) **declared policy** is to utilize to the fullest extent possible all the electric energy which the Wilson and other dams are capable of producing;

* * * in competition with public utility corporations; * * * to undersell its competitors in order to establish a 'power yardstick' and to demonstrate the advantages of public over private ownership of electric light plants."

Under these circumstances, the principles of interpretation either applied or recognized in the cases cited below make both the Act and the program subject to the test of validity supplied by this stated dominant objective and purpose. "Congress can not, under the pretext of executing delegated power, pass laws for the accomplishment of objects not intrusted to the federal government."

Veazie v. Fenno, 8 Wall. 533, 541;
McCulloch v. Maryland, 4 Wheat. 316, 423 (1819);
Linder v. U. S., 268 U. S. 466 (1925);
Bailey v. Drexel Furniture Co., 259 U. S. 20 (1922);
Hammer v. Dagenhart, 247 U. S. 251 (1918);
Hill v. Wallace, 259 U. S. 366 (1925);
Trusler v. Crooks, 269 U. S. 475;
Chastleton Corp. v. Sinclair, 264 U. S. 543 (1924);
Magnano Co. v. Hamilton, 292 U. S. 40 (1934);
United States v. One Ford Coupe, 272 U. S. 32;
Pollock v. Farmers Loan & Trust Co., 157 U. S. 429.

A striking illustration of the examination of the dominant purpose of administrative action under color of the Commerce Clause, pertinent to this record, is found in *Wisconsin v. Illinois, supra.* The complaining states asserted that the diversion of waters "is based on a purpose not to regulate navigation on the lake, but merely to get rid of the sewage of Chicago, that this is a state purpose, not a Federal function." The Master, as of course, took cognizance of this contention and found:

"Whatever may be said as to the service of the

> diverted water in relation to a waterway to the Mississippi, or as to the possible benefit of its contribution to the navigation of that river at low water stages, it remains true that the disposition of Chicago's sewage has been the dominant factor in the promotion, maintenance and development of the enterprise by the State of Illinois and the Sanitary District." 278 U. S., at p. 415.

Responding to this finding, the Court asserted that, considering the limited scope of the Secretary's authority, "he could not make mere local sanitation a basis for a continuing diversion."

The matter is referred to here to illustrate the fact that the dominant purpose of administrative action must be decisive of its classification.

This applies not merely to each element in the program of threatened competition, discussed below.

What is the dominant purpose in installing generating units?

What is the dominant purpose in commercial operation of the steam plant and hydro units?

What is the dominant objective of transmission, of utility distribution?

The decree in this cause did not interfere with navigation, the building of any dam, any government use of electricity. On the contrary, it enjoined petitioners' corporation from taking possession of its ownership of the Wheeler Dam site or interfering with construction until an orderly interval after final disposition of this cause within which the government might conform its program to its lawful powers (a section of the decree to which the Tennessee Valley Authority consented: Sec. 3, I-383).

Yet the sponsor of this project, who has over the years pressed the open objective of power distribution, asserted on the floor of the Senate on May 9, 1935 (Cong. R., p. 7500) that if the injunction issued in this cause shall be sustained by the Supreme Court "we might just as well blow up every dam, not only in the Tennessee River, but every dam in the United States." That means navigation is nothing if the power emplacements have to be leased as on the Kanawha or at Boulder or as licensed under the Federal Power Commission Act. Commercial operation by the federal government is the *sine qua non*.

The co-ordinate branches of the Administration have asserted*that this is a power program.

The Congress knows this is a power program.

It was a power and fertilizer program when S. 46 and S. 49 failed to receive executive approval, and was so admitted and acknowledged. It has been enormously expanded as a power program under this Act.

The public knows it to be a power program. The minutes and public releases of TVA have characterized it as a power program.

We set out in the Appendix* the titles of a representative cross-section of the flood of articles which have appeared in the periodical press with reference to the TVA program, taken from reference cards in the Library of Congress. It would be impracticable even to tabulate more than a minor fraction of the published articles descriptive of the Tennessee Valley Authority and its activities. It would be impossible for anyone to consider this mass of *res gestae* literature and reach the conclusion that the public's acceptation of the Tennessee Valley Authority program was not, as asserted or inevitably implied by its minutes, by the public declarations of the TVA, by the co-ordinate administrative branches of the Administration, by Executive Message, and by the acts

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***Page 122.**

and transactions of TVA proven on this record, a power program.

In this situation, how can this court do other than say again, as to this electricity program:

> "All others can see and understand this, how can we shut our minds to it?" 259 U. S. 20, 37.

If it is, as we insist, a region-wide power program with the objectives and characteristics described in clear-cut findings in detail by the District Court, sustained and condensed in the summary of the Circuit Court of Appeals, can it be sustained as consistent with the Tenth Amendment?

This Court has sustained or disapproved taxes on local functions (which are subject to repeal by Congress), as the facts showed them to fall on one side or the other of the line of legitimate federal action; but a utility program undertaken as an implied means to a gravely disputed end, held by two courts to have as a primary objective the establishment of a "power yardstick," frozen by contract for a generation, can fall only on one side—a permanent trespass against the Tenth Amendment.

III.

THE TVA COMMERCIAL ELECTRIC PROGRAM IN ITS ENTIRETY IS IN VIOLATION OF THE CONSTITUTION.

On the facts and principles heretofore stated, petitioners assert that the Tennessee Valley Authority's commercial electric program is in its entirety inconsistent with the letter and spirit of the federal Constitution in relation both to the functions and obligations of the State and federal governments and the rights reserved to the State and their citizens.

We summarize below certain of the salient aspects in which the means attempted by TVA to carry the program into effect transgress the test laid down in *McCulloch v. Maryland,* that they must consist with the letter and spirit of the Constitution.

A.

The Tennessee Valley Authority Program Is Inconsistent With the Theory and Function of the Federal Government.

(1) The plan of the TVA is to market permanently an amount of power permanently in excess of any expected government requirement. This excess capacity is the result (a) of obsolescence and intentional overbuilding of federal plants which were theoretically constructed for war purposes, but were completed many years after any war requirement had ended, and contemplated commercial use *ab initio,* and (b) of current installations being made for the express purpose of sale and distribution, without reference to any prospective governmental use (Statement, supra, pp. 29-32).

If the excess were not conclusively on this record regarded by TVA as permanent, it would not be committed to the public service and withdrawn from availability for federal use by contracts for 20-30 years. The design is to construct a distributing network of power lines over six states, compete with existing utilities and subject the government to a contractual and justiciable obligation involving utility service throughout the region, essentially permanent in type.

The rates for this continued service for the full terms of

20 or 30 years have been fixed by TVA and are being frozen into contracts in advance of any possible ascertainment of cost of the service. They are therefore unprecedented, even in the commercial world. The government wagers the public Treasury that a propagandist board has guessed right.

(2) While lacking, by reason of the delegated and limited nature of its organic structure, in any *a priori* sovereignty absolute or monarchial in type, no one doubts that within the sphere of delegated functions the federal government holds attributes of sovereignty in those matters which are in fact indispensable to the performance of its responsibilities. The suggestion that the government may, consistently, either with its own functions or those of the States involved, bind itself to manufacture, monopolize and market electricity for a generation under fixed obligation, and in perpetuity by practical implication, is fantastic.

The program in its expanding detail demonstrably hampers and transcends all of the powers by converting the government from a noble conception exercising governmental functions to a competitor for trade in the market place, with the government using the citizen's taxes and property for the stake and the public credit for its capital. That is intrinsically a violation of the attributes of federal sovereignty.

(3) It is not consistent with the theory of the federal government that the government should be intentionally and unnecessarily committed to perpetual or long term commercial servitudes. The reasons are obvious. They are fairly reflected in the reason for the principle that exempts the government from suit in order to protect functions which are truly governmental from the incon-

venience of litigation.* This immunity from suit because of governmental reasons carries a corresponding obligation that the government stay out of the market place.

Applying this principle, what could so interfere with governmental processes as to involve them in a region-wide, or, as intended by the Administration, nation-wide commercial operation of the industrial, commercial and domestic power supply, burdening the resources of the government, its executive personnel, cluttering Congress with a perpetual bickering about a matter admitted on the face of the Act (Sec. 13) and by its sponsor in the debates (Appendix p. 93) to be non-governmental.

The history of this enterprise from 1916 to this day and the assurance that judicial approval of the program as a function of the government would confront every session of Congress with importunities for regional extensions of the plan or for other commodity production by the federal government, present the question here, on this record, for decision in its finality: Is the government of the United States to remain a government or become a commercial corporation? Is Congress to assume permanently the functions of a holding and operating company? Does that object consist with the spirit of the constitution?

(4) Not being a substantive power or an express mandate, plainly a method or a means is not to be implied or to be regarded as necessary and proper or to consist with the letter and spirit of the Constitution where it lowers, subordinates and defeats the sovereign functions and the express duties and obligations of the government and all of its departments. The repercussions upon the executive and judicial departments of the permanent assumption

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*"The doctrine rests upon reasons of public policy—the inconvenience and danger which would follow from any different rule." Mr. Justice Field in The Siren, 7 Wall. 152, quoted in Belknap v. Schild, 161 U. S. 10, 16.

by the government of the commercial function are no less certain, no less burdensome and no less inconsistent with constitutional theory.

B.

Power to Impose a Permanent Servitude Upon the Government Cannot Be Implied or Sustained.

(1) In *Fox v. Cincinnati,* 104 U. S. 783, the Court was considering whether a contract by which the **State** was obligated under a lease of water power bound the State to continue to service it after the abandonment of a navigation dam constructed by the state:

> "The authority of the Board of Public Works to contract in respect to the power was expressly confined to such water as remained after the wants of navigation had been supplied, **and it never could have been intended in this way to impose on the State an obligation to keep up the canal, no matter what the cost, for the sole purpose of meeting the requirements of its water leases.**"

In the case at bar, we have multiple commitments to a perpetual power program, initiated wholly without reference to a war or navigation function, that would in practical effect dominate and impair the primary responsibility —navigation, if the government should hereafter find it in the public interest to adopt some plan inconsistent with the installation or maintenance of hydro units, necessary under TVA contracts to meet the expanding public requirements over the next generation.

The same conclusion of inconsistency with legislative discretion is forced when we recognize that the TVA program is the exercise of **delegated** power in such wise as to withdraw federal property from disposal as contemplated by the Constitution.

We have argued under the property clause the principle underlying the continuing duty of Congress to deal with all property of the United States until disposed of by lease or sale. The facts on this record fully support the principle. Suppose, for instance, that this 20-30-50 year power program had been converted into a perpetual burden on the government as a nitrate program under S. 46 or S. 49*—now, in the space of a few years completely obsolete. Yet had those measures been approved and sustained the property and the government would now be chained to the misconception of 1928 or 1931.

If, under the property clause, Congress is vested with the authority, and therefore subject to the duty, to dispose of federal property where the public interest requires, obviously that property must, until actually disposed of, be held subject to disposition. That status alone is consistent with the theory of continuing legislative responsibility. It is plainly against public policy for the government of the United States to establish a Department and so encrust it with property or function or other mechanism as that succeeding Congresses might be substantially hampered in retreating from the policy.

The Tennessee Valley Authority conception and its execution, in outline and in detail, are violative of this elemental principle.

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*S. 46 and S. 49 provided, by Section 14 (Appendix, p. 62):

"It is hereby declared to be the policy of the Government to utilize the Muscle Shoals properties for the fixation of nitrogen for agricultural purposes in time of peace."

The futility of that declaration is now recognized by Section 5 (n) of the TVA Act, which authorized 50 year lease of the nitrate plant for $1 a year. The Annual Report (Fiscal 1934, p. 15) of the Secretary of War asserted:

"The whole plant has been made obsolete through advancement in the art of nitrate production."

The futility of S. 46 and S. 49 is finally exemplified on this record by the abandonment of nitrates and adoption of phosphates as the basis of TVA experiments.

The program is a deliberate effort to force a coup d'etat; and at the same time perpetuate a dynasty based on national collectivism in power manufacture and distribution. By definition, any policy forced upon the nation from which there can be no retreat is violative of the Constitution. The Constitution can be changed under the prescribed conditions, but a gesture such as the program of the Tennessee Valley Authority cannot be liquidated. Presidents pass on, congresses change, but this authority stands perpetuated; a robot with greater power than its creator.

What provision in the Constitution or theory of interpretation has authorized Congress to delegate powers greater than its own or to perpetuate any such phenomenon?

On its face, in its entirety, the TVA program does not "consist with the letter and spirit of the Constitution."

C.

A Contract by a Federal Agency Which Would Barter Away or Burden a Power or a Function Mandated to the Federal Government Is Void.

(1) A contract directly and necessarily tending to prevent the government from exerting its commerce power or its money power, or so hedging it about as that, to give effect to the contract would make the exercise of a particular power impracticable, is void. *L. & N. v. Mottley, supra; Norman v. B. & O. Ry., supra.*

How much the more certain is it that an attempt by the government itself by contract to subordinate its personnel, its funds, its properties and its energy to the routine marketing of electricity to a vast public is contrary to organic public policy in the absence of an amendment to the Constitution accepting that limitation upon the flexibility and range of continuing governmental responsibility?

We survive today because we were not strait-jacketed by Gargantuan legislative errors during past generations. If the business of government can be contractually cluttered up with a monster cooperative under contract to wet-nurse the Tennessee basin states, and bind future Congresses for a generation, or for all time, both as to appropriations, policies and function, where is left any free play for that change in policy which is of the essence of legislative government?

This phenomenon cuts across every granted power, every federal responsibility.

(2) The same result is arrived at from a specific angle, that of the legislative function under Art. I, Sec. 1, under which all legislative powers are vested—and must be maintained unhampered and uncommitted—in Congress.

The question of a vast proprietary public service is a matter involving continuing public or legislative policy. It is not solely or predominantly a matter of administrative detail. The initiation, extension and abandonment of service is essentially subject to legislative control. Any such long term commitment of the government to a revolutionary region-wide program as is shown by this record is legislative in character and cannot be abdicated, delegated or committed by the establishment of a contractual utility business. What is here asserted as a general principle is applied below to the TVA Act.

The subject has been too recently reviewed to require more than the citation of

> *Panama Refining Co. v. Ryan*, 293 U. S. 632;
> *Schechter Poultry Co. v. U. S.*, 55 Sup. Ct. 837.

(3) We pointed out in the Statement, *ante,* pp. 59-63, the basic conflicts between the commitment of the Tennessee River to a commercial power program and the regulation of navigation.

As to power, the government has no constitutional duty except to refrain from the use of means that will encroach upon the reserved powers; as to navigation, Congress has an imperative mandate, in continuing trust.

> "No rule is better settled than that a trustee * * * cannot represent in himself two opposite and conflicting interests."—Mr. Justice Story, in *Wormley v. Wormley,* 8 Wheat. 421, 441.

To the same effect:

Robertson v. Chapman, 152 U. S. 673,
Magruder v. Drury, 235 U. S. 196,
Marsh v. Whitmore, 88 U. S. 178,
Wardell v. Union Pacific R. R., 193 U. S. 51.

This record shows a gross conflict in the duty of this agency in both respects. We assert with entire conviction that the commitment of this river to power offers a bribe to TVA to act arbitrarily toward citizens in its river control, to transgress the traditional rights of the states; and as to commerce, that it is a flagrant subordination of the highest of all public duties, a mandate under the Constitution, to a commercial interest based on the non-federal objectives underlying this extraordinary organization.

D.

The Tennessee Valley Authority Program Is Inconsistent With the Tenth Amendment.

The casus threatening the traditional functions of the States from the TVA program is clearly indicated by this record.

"In other words, an immense body of legislation, which heretofore has been recognized as peculiarly within the jurisdiction of the States, may be taken by Congress away from them. Although Congress has not largely entered into this field of legislation, it may do so, if it has the power. Then we should be brought face to face with such a change in the internal conditions of this country as was never dreamed of by the framers of the Constitution. While the acts of Congress are to be liberally construed in order to enable it to carry into effect the powers conferred, it is equally true that prohibitions and limitations upon those powers should also be fairly and reasonably enforced. Fairbank v. United States, 181 U. S. 283. To exaggerate in the one direction and restrict in the other will tend to substitute one consolidated government for the present Federal system. We should never forget the declaration in Texas v. White, 7 Wall. 700, 725, that 'The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.' " *Keller v. United States*, 213 U. S. at 148.

The Tennessee Valley Authority Program Deprives the States of Traditional Revenues.

The debates in Congress on the Norris Bills illustrate adequately one aspect of the problem of the States. (See excerpts in Appendix, pp. 90-92). The Senators from the State of Alabama denied the right of the government to subject the Tennessee River to commercial production of power. So the sponsor of the measure conceived the idea of making a percentage allowance to the States. That is now reflected in Section 13 of the Act. The donation is, however, revocable at intervals in the discretion of the Board, approved by the President—upon what test, standard or theory does not appear, other than the standard of political pressure or insistence at the time. The State is a beggar at the board; is violating for a revocable consideration a proprietary birth-right held in trust which it could not by grant or treaty convey to the government. *Pollard v. Hagan, supra.*

The taxes paid by electric utilities in the United States have increased from less than three million dollars in 1902 to over $203,000,000 in 1932 (U. S. Census Rep.) and $245,000,000 in 1934 (Edison Elec. Inst.), and amount to 14.3% of the total revenue from ultimate consumers. Petitioners' corporation paid the State of Alabama 14.5% of 1934 revenue (Moody's Manual of Public Utilities), or $2,224,585. (See also Appendix, pp. 110-113.)

On the basis of revenue alone, it is obvious that the States could not survive an extension of the "surplus capacity" program of the federal government generally into industry. The existing investment portfolio of the government obviously threatens not only a radical shrinkage in taxable properties and incomes but the deadly menace of competition by the federal government in a thousand fields through foreclosures and direct or controlled operations, if, after taking over property held as security for debt, the government does not in good faith and in an orderly manner proceed with liquidation, as would a bank or insurance company in that manner acquiring inadmissible assets.

Each business taken over by the government and by necessary result a monopoly means not only the loss of ad valorem and like direct revenue but shrinkage indefinitely beyond.

The transfer to the federal government of regionwide and nationwide commercial functions, with resulting loss in revenue to the states initiates a vicious circle of impairment of state functions and responsibility. The state is responsible for the social welfare of its citizens. *R. R. Retirement Board v. Alton Ry.,* 55 Sup. Ct. 758. With each encroachment upon state revenue through expansion of federal function the ability of the state diminishes and the extraordinary phenomenon of marches on Washington and invasion of the Constitution increases. The only method by which the States can meet the responsibility of their reserved power is to be left with their traditional sources of revenue, already curtailed under the operation of the 16th Amendment.

Assumption on the broad scale of this TVA program of commercial sources of revenue by the federal government means the end of the road.

E.

The Program Is Inconsistent With the Constitution in Its Region-Wide Displacement of Utility Regulation Within the States by an Anomolous and Arbitrary Federal Monopoly of Utility Service.

Local regulation of utility service is an essential characteristic of our dual system. It is as ancient as the common carrier, the warehouseman or the tavern. It is, in short, the police power. The basic nature of utility service is that there is, through direct control by the state, an identity of local interest between the state, the citizen served and the agency rendering the service.

Local electric utility function and control do not belong to that class of function now being so aggressively urged on this Court as requiring national control because of the asserted national character of the problem. There is no legitimate national problem in the utility field in the State of Alabama. It is intrinsically, economically and constitutionally a local function, involving correlative duties and responsibility for adequate service and reasonable regulation.

It is precisely the sort of function that was intentionally withdrawn from the powers and duties of the federal government, by the most impressive and basic negation of the Constitution, the Tenth Amendment. That negation was added by direct mandate of the people, who declined to allow it to remain a mere implication.

Utility service without a regulating agency in the traditional sense of the term is an anomaly in America. The TVA is a long term board, committed by Section 2 (h) of this statute to public protestation of a "belief in the feasibility and wisdom of this Act," and to no principle, test or standard of decision or review.

Utility commissions under State laws are subject to definite responsibilities, and, behind all, the Constitution of the United States and the effective principles of administration declared by this Court.

Perhaps the greatest contributions of this Court to the development of jurisprudence in America, have been in marking out the boundary between state and federal function, and in laying down the principles of fair play inherent in the due process clauses of the Constitution as applied to administrative action.

Next to the Constitution itself this great body of American administrative procedure, subject to judicial review under the Constitution, is perhaps the greatest contribution of the American people to social progress.

These traditions come to an end with the Tennessee Valley Authority.

This anomalous agency of the Federal Government, subject to no classification under the Constitution, to no revisory action or control in the conduct of local service, usurps all functions, state and national, under color of unlimited power granted in accordance with the President's desire for the creation of a federal corporation to have all of the powers of government, "but possessed of the flexibility and initiative of a private enterprise." The TVA Board has realized that aspiration.

> "Obviously, if the executive could determine its own competency, it would in fact be the master of the legal imperatives by which it lives."*

Here there is arbitrary power, perpetuated and removed from all sanctions with the fangs of its policy embedded for a generation.

No such emasculation of the police power of the States can be implied consistently with the nature of our dual system. It does not consist with the Tenth Amendment.

The confusion resulting from this substitution of federal function can not be better portrayed than by this declaration as to the necessity for avoiding the result which portends on this record:

> "We have a principle which is safe for the states and safe for the Union. We are relieved, as we ought to be, from clashing sovereignty; from interfering powers; from a repugnancy between a right in one Government to pull down what there is an acknowledged right in another to build up; from the incompatibility of a right in one Government to destroy what there is a right in another to preserve." *McCulloch v. Maryland,* 4 Wheat. 316, 430.

The TVA decrees that the States and their citizens are to have substituted, for the relationships established under the Tenth Amendment, an executive authority which, it is said, the courts will not revise unless the executive order "is an action of mere oppression, an arbitrary fiat that overleaps the bounds of judgment," as, for instance, "if the executive were to assert a relation between the transportation of petroleum and the maintenance of the gold standard or the preservation of peace in Europe or the Orient."*

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*Laski, "Introduction to Politics," 1931, p. 62.

Now it so happens that the TVA commercial conception demonstrates an absence of relationship which reaches beyond the high water mark of arbitrary pretense employed in the quoted illustration, that is, in the effort to establish a relationship between the improvement of navigation and the permanent commercial operation of a utility system. The origin of the effort to establish the "germ of a nexus" upon which to pinion the Tenth Amendment is found in the prototypes of Sec. 2 (h) (and Sec. 5 of the Amendment) of the TVA Act: S. 49 (1931) and S. 46 (1928).

In S. 49 it was declared by Section 2 (h) that:

> "(h) All members of the board shall be persons that profess a belief in the feasibility and wisdom, **having in view the national defense and the encouragement of interstate commerce,** of producing fixed nitrogen under this act of such kinds and at such prices as to induce the reasonable expectation that the farmers will buy said products, and that by reason thereof the corporation may be a self-sustaining and continuing success."

The sponsor of that conception, and of the TVA Act, would have little difficulty in sensing a relationship between the transportation of petroleum and the gold standard, or between indefinite multiplication of surplus capacity power plants, utility transmission and distribution and the regulation of commerce, reimbursement of the federal treasury and an oath of fealty to the feasibility and wisdom of the Act.

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*Mr. Justice Cardozo, dissenting in Panama Ref. Co. v. Ryan, 293 U. S. 338, at p. 446.

Is a Constitution to be sacrificed to such jitter?

F.

The TVA Program Is Not "Necessary and Proper" or Reasonably Related to the Execution of Any Power of the Government Under the Constitution.

(1) The facts as to availability of leases of the Muscle Shoals plants and Wilson Dam are set out or documented in the Appendix. There has at all times been a reasonable market for leases of the Muscle Shoals power units and for all reasonable additional units which the market would warrant (II, 520-530; Statement, supra, p. 22; and see for full statement in detail Appendix, p. 96). There is no excuse in navigation or economics for the government to construct and install the equipment on power dams where a market for the product can be obtained only by competitive exhaustion of existing utilities. To justify commercial installation and operation on the desire to avoid a waste of power, is without sense or fair play. It is not avoiding economic waste. It is commission of an economic crime.* The government has no right to expect to be able

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*The economics of the picture is thus exemplified in the official release by TVA of the dominant objectives of that agency (II-606), from which we excerpt this statement:

"Looking at the country as a whole, without respect to public operation or private operation, it is perfectly evident that we now have and soon will have a tremendous surplus supply of electricity. Within the area of the Tennessee Valley, for example, privately owned electric companies have generating and transmission facilities which can care for between 30% and 40% more demands for electricity than is now required even allowing for reasonable spare capacity. A fair estimate is that 25% of the investment in power houses and transmission lines is idle, and is piling up fixed charges, because the customers of these companies are still tied to a low average use of electricity. The Tennessee Valley Authority has a hydro-electric plant at Muscle Shoals with a rated installed capacity of 250,000 H. P. But that is only the beginning of the story. The Authority is constructing a dam and power house at Cove to "dispose of" property under the property clause when created for the purpose and when the proposed disposal would glut the market and necessarily bring a solvent industry, regulated by public authority, to its knees. There is no implied power under the Constitution to conduct an economic raid upon the States and their citizens. Upon what theory are administrative means related to a constitutional end, when they necessarily contemplate the horizontal destruction of industry on any such scale?

The government may properly expect, if it has lawfully provided emplacements, to be able to lease them before other equally available power units are added to the power supply. That recourse has been at all times available. The power companies have gone far beyond that legitimate expectation. TVA made no effort after the expiration of its first lease of the steam plant to Alabama Power Company to lease or otherwise dispose of any of the existing plants. TVA minutes recite that it can not, under the Act, make such disposition (II-540; Statement, supra, p.

Creek, and another dam and power house above Muscle Shoals at what is known as the 'Joe Wheeler' dam, which together will increase the capacity of Wilson Dam to at least 600,000 H. P. Out in Colorado, Boulder Dam is rapidly being carried toward completion at a total cost of $165,000,000. Boulder Dam on completion in 1937 will add to the nation's annual supply of electrical energy 4,300,000,000 KWH. At Grand Coulee on the Columbia River and at Bonneville in Oregon are two giant power developments which are under way, estimated to cost another $100,000,000. The State of New York and the Dominion of Canada are making plans for a giant power development on the St. Lawrence River with an installed capacity of 2,200,000 H. P.

"These figures present the crux of the power problem in the United States today: **How to get this tremendous existing and future supply of electricity to the people.**" (II-610, 611)

"We are making provision for one of the largest hydro-electric developments in the world, with a potential three million horse power available. We are expending, and expect to expend, millions upon millions of dollars in construction activities, all looking toward the development of more and more power. Although we are bending every effort to greatly increase the use of electricity in the home and on the farm, it is obvious that only a large-scale industrial expansion will absorb the great pool of power which is thus being created." (II-634). **And this in a nation shocked to its base with depression and public debt!**

22), but must distribute preferentially to public bodies and participate in operations "from power house to consumers' premises," either directly or through control contracts, throughout the entire transmission radius. That, as was proved by TVA (II-963), forces transmission by TVA. Municipalities in **fourteen** states can not, practically, join together and lease units, nor build transmission lines. Interconnected power systems can. They are under public mandate to distribute equitably. Hence, the TVA plan is a studied purpose **not** to dispose of the plant or even the product through logical means but to utilize it in a particular way and for a particular objective which has no reasonable relationship to disposal or any federal function, but has a logical relation to national collectivism and displacement of the Tenth Amendment.

(2) In view of the availability of ready lessees for all units for which there is a market not already supplied by utilities regulated by the States, and of the complete willingness expressed on behalf of responsible tenders to look to federal units as their power reserve, on fair terms, it is not possible to contend with reason that the only method by which TVA can dispose of the only property owned by the United States (viz.: the plants themselves) is (a) by operating them commercially, and (b) by transmitting and distributing the output of the plants, in permanent utility service in state domain.

We assert that on this record:

(a) The intentional multiplication of these electrical installations now under construction was a flagrant act of constructing electric manufacturing plants in order to operate them and market the electricity.

(b) The original construction of Wilson Dam and its equipment under section 124 of the National Defense Act, built after the Armistice, was, from the outset, with a view to commercial operations as contemplated by the original Act, twice asserted by Congress by S. 46 and S. 49 and restated in the TVA Act to be the policy of the government; that is, commercial operation for fertilizer or nitrate production, mandatory under S. 46 and S. 49 and optional under the TVA Act, with the surplus capacity of the plants to be devoted to the permanent intentional production of electricity for commercial sale.*

The assertion that the surplus capacity thus intentionally provided and operated is not deliberately brought about can not be sustained. Engaging in a commercial business intended from the outset and continued for profit is not a lawful federal function.

(c) Considering the origin of the commercial conception in the National Defense Act of 1916 and the plan and program of TVA, it cannot be justly contended on this record that the utility program of the TVA is reasonably related to the disposal of any federal property of the United States. It is related only to disposal of that which was acquired to be disposed of.

(d) What has been stated with reference to the lack of any reasonable relationship as to the plan and program of the Tennessee Valley Authority in its entirety, as made plain on this record, applies in detail to the commercial operation directly by the government of the several units, both those constructed under the policy of the National

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***In this connection, note the following:**

"Mr. Glenn: * * * If all matters affecting navigation were out of this measure, and all matters affecting flood control were out of the measure, is it not likewise true that the Senator from Nebraska would still be enthusiastically for it?

"Mr. Norris: I would be. I would be in favor of it, because when we passed the original measure it was a power proposition more than any other one thing" (Cong. Rec., Vol. 72, Pt. 6, p. 6507; Powell, p. 438; Appendix, p. 89).

Defense Act of 1916 and those added by the Tennessee Valley Authority as a basis for its intent to monopolize power distribution in the Southeast.

It applies also to transmission, and above all does it apply to competitive distribution to consumers, whether rural or urban.

Those functions have no reasonable relation to the disposal of federal property in any proper sense.

TVA has made no effort to obtain purchasers or distributors, wholesale or retail, for any fraction of legitimate power which under any conceivable theory could be authorized. As testified by Dr. Thurlow, this federal plant "has been a white elephant in our back yard since its completion." The utilities menaced with destruction would have no alternative but to make fair terms for the lease of emplacements or units for utilization of power, when and if lawfully authorized, as rapidly as the market or obsolescence of existing plants would permit; and would obviously and necessarily pass on to the public any saving which could result. But they could not pass on immunity from taxation, or interest at 3%, or the repudiation of actual plant cost or ignore depreciation. On this record they are shown to have stood ready as a willing lessee of any surplus plant capacity which could be tendered except as a result of the political, malevolent and vindictive action of this federal agency; and have stood ready to pass on to the public the advantage of any lowered costs.

While within bounds that are related and not arbitrary, a discretion rests with Congress as to the choice of means to a constitutional end, where not intrinsically violative of the Tenth Amendment, it is obvious that where the choice of means is based not on any reasonable necessity, but upon the desire to overbuild and monopolize a market, contrary to the efforts of the Administration itself under sanction of Congress to curtail what it states are the evils of overproduction; when it presses that objective of monoply and oppression contrary to common law principles and contrary to the principles of its own public policy as to commerce, as declared in the Anti-trust and Federal Trade Commission Act, it is indisputable that the TVA stands on this record an economic outlaw, impersonating public function, taking a market and taking property by abuse of the resources of the Federal Government. Means which fit those specifications can not be said to be reasonably related to a legitimate federal end. See *American Bank and Trust Company v. Federal Reserve Bank, infra;* nor do they consist with the letter and spirit of the Constitution.

As to the plan in its entirety, so of its parts. That means of that character do not comply with the test of relationship or consistency with the letter and spirit of the Constitution prescribed in McCulloch v. Maryland is obvious; nor, specifically, with the due process clause of the Fifth Amendment.

Essential specific steps among the competitive agencies which are employed by TVA which are arbitrary, unrelated to a legitimate end, and inconsistent with the letter and spirit of the Tenth Amendment, are:

(e) Long term contracts as a means to take over customers from petitioners' corporation. These supposititious commitments of the government are not reasonably related to any federal function. They are, for the reasons urged, violative of federal function. They are violative of the sound legislative policy recognized in the lease statutes (40 U. S. Code, Sec. 303; and see statute referred to in United States v. Gratiot, supra). They are related not to a legitimate substantive power but to a series of illegitimate implied powers.

(f) The reservation of domination and control over resale rates as a device to undersell and oust petitioners' corporation is not reasonably related to legitimate ends. In addition to the defects stated above, and in addition to an unwarranted displacement of state function, the practice directly accomplishes monoply of control.

IV.

THE SPECIFIC ACTS AND TRANSACTIONS OF TENNESSEE VALLEY AUTHORITY COMPLAINED OF ON THIS RECORD ARE SEVERALLY AND AS PARTS OF AN INTEGRAL POWER PROGRAM VIOLATIVE OF THE FEDERAL CONSTITUTION.

Interconnection of Power Units.

(1) In applying the general principles of law discussed under the foregoing headings to the specific acts and transactions of TVA scheduled in the Statement of Fact, and to the integral program of which they are a part, it is to be borne in mind that the Tennessee Valley Authority interconnects all of its power plants as acquired; that the incentive of revenue, which is the sole asserted justification for the installation of hydro-electric units in successive dams, requires that TVA extend its commercial market in State domain as units are added. (See Chairman Morgan, II-407; also Finding No. 27, II-1042.) Otherwise, as stated by Chairman Morgan:

> "It would not do any good to have generating units in a dam if it were permitted to remain idle. * * * The generating units would be of no use to navigation or from an economic standpoint unless some of

the power could be sold. The relationship is one of economics. If cost were not an item we could build navigation systems without generating equipment at all, and we would get the same quality of navigation as we would with generating facilities."

Restricted Application of the Program Would Not Validate It.

(2) There is manifest on the record and on submission to the Circuit Court of Appeals a definite effort by TVA to minimize the extent of the TVA program. If affirmatively illegal in detail, the small size of the operation would not sustain it. On the other hand, the proven extent and objective shown on this record have an unmistakable bearing upon a basic constitutional question before this Court. We submit that upon proper analysis no phase or detail of this gigantic program is, in and of itself, an appropriate means to a substantive federal end.* But even if any such single item in the whole were lawfully related to a federal end, the question would remain whether a permanent, region-wide, commercial utility system can be said to consist with the letter and spirit of the Tenth Amendment. We assert emphatically that it cannot, either in its integral aspects or as means for disposing of idle or surplus capacity plants or as means for disposing of asserted proprietary rights to use surplus waters, taken

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*Either (a) as to the departure from the final recommendation of the Corps of Engineers (House Doc. 328, supra; approved by the Rivers and Harbors Act of July 3, 1930, Appendix, p. 114 et seq.) that low dams, in the remaining river series proper, are all that is desirable for navigation, or (b) as to the commercial manufacture of electricity at Muscle Shoals, or (c) as to the multiplication of commercial generating units in the series of power dams, (d) the commercial operation of those units for non-federal purposes, (e) the establishment of a commercial transmission network, (f) the establishment of commercial distribution systems, (g) the execution of long term contracts, (h) the establishment of distributing agencies by federal investment and under federal control; all of which, petitioners contend, is in detail illegal.

in the raw, by converting them into finished products at surplus capacity plants as part of a permanent commercial utility system.

In *United States v. Gratiot, ante,* a single lease of land in the public domain was held not to justify apprehensions of inconsistency with the Tenth Amendment. But had there been a showing that the government was using an extensive area of public domain in a given state as a basis for region-wide productive effort on land, traditionally a non-federal function,* financed and controlled or monopolized by the government in such wise as intentionally to dominate permanently any extensive competitive market or industry within the State, it is clear that federal function would be violated.

There is nothing in the Constitution or in the act admitting Alabama into the Union to suggest that the proprietary interest of the state in a great stream, with potentialities for power inherent in the stream was, instead of an asset, a menace. A menace that subjected the state and its citizens to the certain danger of monopoly by the federal government over the ultimate power and therefore over the industry of the region. There is nothing in the commerce clause to suggest that power manufactured from the falling water in Alabama could be diverted permanently by the government from the State, or employed both within and without the State to bring about a discrimination in the treatment of localities inconsistent with the policy of the State as now or hereafter established under its legislative duty. That process threatens a ruthless relocation of industry and of population unless, as the only alternative, the objective of the Tennessee Valley

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*"Commerce has nothing to do with land while producing, but only with the product after it has become the subject of trade." McCready v. Virginia, 94 U. S. 391, 396 (1876).

Authority is accepted—monopoly of power in the entire area, and by logical and necessary extension, throughout the United States.* No one can read the public releases of this Agency without conviction of its intended satrapy in the area.

Temporary protestation of cheapness by means of an invalid contract to keep the government in the power business for twenty years at less than cost, even if the commitment were valid for the term, is not a sufficient consideration for a perpetual sacrifice of the police power and subjection in fact of industry to dependence upon the federal government for its commercial power.

The implication of that situation finds no basis in the Constitution.

Systematic Effort by TVA to Understate the Facts.

(3) Because of the systematic effort by this agency of the government to minimize the integral extent of its commercial program, petitioners are justified in calling attention to publicly announced current developments.

Thus TVA was at pains to prove and insist below that while it was making provision for six emplacements at Pickwick and eight emplacements at Wheeler, the present plans called for no generating unit at Pickwick and for the installation of only one at Wheeler, and ascribed that single unit to a reluctant necessity for the fitting of the mechanical unit in place (II-861; but see II-1022; Fng. Nos. 149, 150). The press of November 18, 1935, reported the announcement by TVA that contract had been awarded for an additional 45,000 hp. turbine for Wheeler, scheduled for delivery in 1936; and under date November 23, 1935, announced the signing of a 20-year contract to supply power for the City of Memphis; that the designing of the transmission line was under way from Pickwick Dam to Memphis; and on November 27, 1935, announced an additional dam in the series at Cole's Bar (Guntersville).

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*The TVA release commenting upon the influx of industry into the region, asserted that industry would turn to the region as the river yields to this program for the development of low cost power, under public distribution, with centralized accounting, control and supervision in the hands of a regional authority; that it was TVA's duty to encourage and stimulate the growth of large scale industry. This means of course lack of ability of industry to compete with those supplied by TVA where the power cost is a factor in the cost of the commodity. See II-634.

With this preliminary, we pass to a summary of the principal specific acts and transactions employed and threatened in the government's program of competition and inevitable monopoly, which as means to some real or fancied federal end, we contend are intrinsically and as parts of an integral objective, inconsistent with the Tenth Amendment.

Schedule of Principal Specific Acts and Transactions.

(1)

Commercial Operation of Steam-Electric Plant at Muscle Shoals.

Congress, having heretofore authorized the construction by the Federal Government of steam-electric plant No. 2 at Muscle Shoals for the manufacture of war materials, but having plainly intended it to be constructed so as to be available for commercial production, and now having requirement for only a fraction of its capacity, can not lawfully authorize the Federal Government to operate the plant for the commercial manufacture and sale of electricity in the operation of a commercial electric system, utility in type, in the permanent service of the public throughout state domain, for non-federal purposes, and in competition with citizens; the plant not being proposed to be leased or otherwise "disposed of," but proposed to be permanently operated directly by the government in the business of commercial distribution and sale of electricity to the public.

The plant has installed capacity of 60,000 KW, subject, under Section 16 of the TVA Act to increase by an additional unit (30,000 KW), to be installed by TVA on approval by the President.

The answers to interrogatories filed by TVA stated that it planned to connect all of its plants together (II-669). The departmental organization of TVA shows that it has a Steam Power Generation Division (ib.). The official release for April 22, 1934, referring to the TVA program, asserted that

> "The presence of coal in great quantities for stand-by and auxiliary steam plants will tend to keep the cost of electricity below that possible in areas having favorable hydro-electric power but in which coal is costly" (II-633).
>
> "The Tennessee Valley Authority has a hydro-electric plant at Muscle Shoals with a rated installed capacity of 250,000 horse power. But that is only the beginning of the story" (II-610).

Section 15 of the Act makes available $50,000,000 to TVA for the construction of additional steam plants and other power units.

The District Court made, at the request of TVA (II-1079), a finding to the effect that TVA would as the result of the completion of the announced plan for construction and installation be able to generate two and a half billion KWH of electricity annually, **including the capacity of the steam plant** (No. 151, II-1085). The other findings as to TVA capacity included this plant (No. 53, II-1051), and TVA's witness Bowman testified that the capacity and use of the plant as part of the system had been fully considered by the staff (II-857, 858). The testimony of the engineer in charge of the Muscle Shoals properties shows the interconnection of the steam plant in the TVA network (II-960).

It is surprising, therefore, that on this record the TVA should not face this issue, and should state that "There is no evidence that the use of these steam plants is proposed in connection with the transmission lines here involved."*

The invalidity of this proposed operation is clear, whether the surplus capacity was foreseen and intended or not at the time of acquisition. Obviously it was, in every instance; yet the protection of the Tenth Amendment is none the less obligatory where it is transgressed, whether Congress or an administrative agency has acted with or without motive at the outset to transgress it.

If TVA disclaims on this appeal intent to use this major steam plant in its system either for current use or as a stand-by to provide commercial continuity of service for its long-term commercial contracts, in competition with petitioners' corporation, there should be decretal and declaratory action that will protect petitioners' corporation against the changes of mind which have characterized the course of TVA as the exigencies arising out of this suit have arisen. The record shows an intention to sell electricity from the pool, including this plant. That is sufficient.

(2)

Inland Commercial Steam-Electric Plants.

Congress cannot lawfully authorize the purchase of inland steam-electric plants for operation as part of or in furtherance of a commercial federal utility network of the nature and for the purposes stated above.

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*Memorandum for respondent Tennessee Valley Authority on petition for writs of certiorari, p. 14.

In addition to the steam and oil plants already purchased and operated by TVA, Section 15 of the Act makes available $50,000,000 to TVA for the construction of steam plants and other power units.

This function, based on the interconnection in the TVA power pool of all its generating plants, is a direct case of merchandising, without past or prospective relation to any government use.

The plants constitute manufacturing units purchased for commercial operations and are parts of the integral system. They are proportionately small; are probably used for stand-by service, but represent a type, interconnected, on this record, and potential to an unlimited amount.

If disclaimer is made by TVA of the intention to continue the use of these plants as a means of competition with petitioners' corporation, that result should be made certain by decree.

(3)

Commercial Hydro-Electric Plants.

Congress has no more right to establish a permanent commercial manufacturing business of operating power plants constructed in connection with navigation dams on the Tennessee than it has to establish that business at the Muscle Shoals steam plant. The assertion of the right is based on the hypothesis of some mystical proprietary ownership by the government either of the surplus waters or what is loosely called water power. Since the sole right of the government is the governmental power of regulation, and since "surplus waters" are those admittedly not necessary to be manipulated for navigation, and constitute the overwhelming volume of the natural flow of the stream, unaffected by the dam after the pool level is filled, only a minor fraction of the flow being requisite for navigation, it is obvious that surplus waters do not fall within any proprietary ownership of the government.

No less confusion is inherent in the assumption of government proprietary ownership of water power. We contend that whatever the rights, proprietary or otherwise, which have been acquired by the government in respect to the waters, they do not authorize the establishment of a commercial plant and business to convert them into power for transmission and distribution as shown on this record.

We have discussed the lack of basis for the vague and formless theory of reimbursing cost, on which alone TVA rests its structure. See *Brown v. United States,* and I-G, supra.

There is no justification in the decisions for any confusion whatever on this subject. The federal government is trustee of a power to regulate navigation. No proprietary right attaches to that governmental duty. It can not be bartered, committed or fettered. It carries no title to water and no right to deprive the States of their sovereign rights, beyond regulation for navigation. The government at these plants owns nothing as a proprietor except the property it constructs. It owns neither the bed, nor the banks, nor the "water power." The water power was inherent in the natural flow of the stream downhill, an element in the river beyond time immemorial. The river was not created nor the waters produced by the government. We have discussed above the so-called surplus water cases, their origin in state function and the lack of discrimination in extending the argument on which the *Kaukauna Case* was decided to federal function, either as to a single plant or to this regionwide conspiracy against the Constitution.

We observe at this point that petitioners' corporation is the owner of the lands on which Wheeler Dam is being built, both ends, above and below (Sec. 3, final decree of March 2, 1935, I-383).

Our assertions are (a) that the government holds no proprietary commodity or right in the waters;

(b) that the government, if it owned any commodity ~~or~~ right in the waters, is not attempting to sell it or dispose of it;

(c) that if the government owned any such commodity or right, that it could not employ it as the basis for a business of the character shown on this record;

(d) that the government can not, by the use of coal or oil or water power, whether owned or confiscated or stolen, use that source of energy to engage in a proprietary business of the character shown on this record;

(e) A vast governmental business can not be predicated upon a desire to usurp commercial water rights or pervert the right to regulate navigation into monopoly of surplus waters—in order thereby to process the wrong and make a business of it.

The statement which appears in the opinion of the Circuit Court of Appeals adopting the evasive argument of TVA that water power is *sui generis,* and that "there is gold in it" does not face the issue or announce a principle. The terms used are alien to the Constitution. They are "general welfare" in reverse; a grabbing clause to accompany a spending clause. They do not bear analysis.

The fact that the Circuit Court of Appeals was not able to predicate this commercial business on any functional analysis of the title or ownership or manufacturing process involved, is quite conclusive that there is no logical basis upon which it can be predicated.

The question is not as to the characteristics of water or any of its elements or derivatives, but what are the characteristics of the federal government, and as to that we repeat that this premeditated multiplication of power dams in a glutted market, with the express contemplation of permanently plunging the government into the power business shown on this record, is flagrantly beyond its Constitutional authority.

We have stated that the case for commercial operation of the hydro plants is precisely that of the steam plant. There is, to be sure, a slight distinction between the two, in that in the case of the steam plant at Muscle Shoals, the initial conception of that plant (and Wilson Dam alone among the hydro-plants) at least had a real relationship to the production of war nitrate, whereas the commercial units being multiplied in the Tennessee River dams are plainly not intended for any known war use. The doctrine of relationship is not only remote—it is invisible.*

(4)

The Region-Wide Competitive Utility Operation of TVA Is Illegal.

Whether the government owns factories or not, raw materials or not, has attempted to condemn proprietary rights to surplus waters or not, congress cannot lawfully authorize the TVA to establish and operate the commercial electric system, permanent in character and utility in type, shown by this record.

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*Section 10 of the Amendment, amending Section 26 of the original Act, provides that the Board may in its discretion retain such of its revenues as may be necessary for the operations of the dams and reservoirs, and "in conducting its business in generating, transmitting and distributing electric energy and in manufacturing, selling and distributing fertilizer and fertilizer ingredients." Appendix, p. 36.

In *Wisconsin v. Illinois,* supra, the dominant objective of the diversion of waters from Lake Michigan was sewage, here the dominant objective of the system is the establishment of a commercial, regulatory yardstick to supplement state regulation of local utilities by government operation. It is illegal. Maps "A," "B" and "C" will show the territorial scope of this integral program. The TVA official description of its own program, its minutes, its annual budget request (II-664-668), its annual report for 1934,* the description of its objectives by its officers, by its sponsors, and its acts, show that its dominant purpose is non-federal; none of the purposes of its utility systems are governmental.

It is not disposing of anything that it can lawfully sell. The sale of power is the sale of elements which are proprietary, local and not federal functions.

Specifically, therefore, petitioners assert that the establishment and conduct of this utility system should be restrained, in so far as it proposes absorption of Alabama Power Company service area; and that the commercial manufacture and sale of power whenever made for sale or consumption in state domain in competition with the Power Company, or the ostensible disposition of these plants to straw agencies of the federal government for the same purpose should be enjoined.

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*House Doc. No. 82, 74th Cong., 1st Sess.

(5)

Dynamic Investment in Utility Systems.

On the specific facts shown on this record, Congress cannot empower the government to participate in the construction, maintenance and operation of utility distribution systems in competition with citizens.

Municipal utility operations do not constitute a governmental function. They are proprietary in character. Selection by TVA of a municipal agency or of a no-recourse, no-asset corporation is no different than organizing TVA to perform the function for the government.

The dominant factor is in all such cases the government. The sole proprietor at the outset is the government. Where the investment takes the form of a loan, the loan or investment are not static. They are dynamic. They carry control and participation.

(6)

The Contract of January 4, 1934.

The contract of January 4, 1934, is void because affirmatively in violation of the Constitution in its principal objective and in its material details. The invalidity of the proposal to put the government in a permanent utility business is not the sole ground of its basic invalidity.

The contract is not only for the primary purpose of acquiring going utility properties, with attached customers, for continued operation and enlargement by TVA, as part of its commercial utility net work (Statement, supra, pp. 39-41). Its express and necessary purpose and effect is to set up a monopoly of electric service within its territorial area, by an agency not subject to regulation by and within the State of Alabama; an agency to control rates and dominate service.

The contract on its face commits the power company not to compete, even along the line of its transmission system in any event reserved from the contract (all lines over 44 kv capacity—Sec. 2, I-135).

The nomenclature employed by TVA refers to this territory as the "ceded area" (II-621).

(7)

The Principal Methods of Sale Employed by TVA in Its Program Are Alike Illegal: Commercial Transmission and Distribution.

We have discussed the commercial manufacture of power at steam or hydro plants as the basic illegalities in this regional program. Next in the objective is transmission and distribution, alike illegal in basic purpose and subject to the further infirmity that transmission and distribution are even more remote in relation to navigation and are themselves, in the order stated, the more definitely inconsistent with the letter and spirit of the Tenth Amendment.

It is inevitable that transmission involves, though not to so dramatic an extent, all of the consequences of distribution in the irreconcilable clash in sovereignties and the certainty that once having entered the field of transmission there is no retreat.

As between generation at the dam or at the steam plant, and transmission, there is, of course, the fundamental distinction we have noted *(Utah Power & Light Co. v. Pfost, Arkadelphia Milling Co. v. St. L. & S. W. Ry., supra)*. The commercial manufacture of a commodity for its controlled sale and distribution within state domain, is commercial operation within state domain. The government is still "the efferent nerve." In Alabama it will be the sole investor, the proprietor. Manufacture and marketing at the plant would keep up at least an appearance of restraint. Yet with straw corporations to serve as federal agencies, financed and controlled, the distinction between generation and sale to these agencies for controlled transmission and distribution, and transmission or distribution by the government itself would be merely colorable. This program exhibits no restraint. It transmits power from power house to consumer. The fiction of direct service only to farmers and small villages is a smug deception, a deception that avails nothing if it were true, for that would still be transacting permanent commercial business within state domain for objectives proven on this record with a paralyzing certainty.

The reason why there is a disposition to try to keep up the face of wholesaling is that retail distribution dramatizes the enormity of this assault on the Constitution; and promotion of local public ownership adds to the popularity of the subvention of the Constitution.

Wholesale distribution with TVA rate and accounting control is the full legal equivalent of TVA distribution.

Problems will begin to beset this court, such as police regulations for the safety and convenience of the public when the federal government occupies public streets; the question of extensions; all the processes of regulation; the question of taxation; the question of federal agencies. In short, a recasting of the Constitution.

(8)

The Methods in Detail for Advancing the General Objectives Are Illegal.

The conception which applies to the program as a whole applies in detail to its methods. They are alike illegal:

(a) The long term contracts, committing the government to indefinite servitude, and the representation that the commitments are valid and binding upon the United States, whereas those commitments are manifestly void;

(b) The use of federal funds to finance and dominate competitive distribution systems;

(c) The practice of reserving to the government (TVA) the functions of management and control over the rates and other basic functions of management of its selected agents for distribution.

(d) There can be no doubt on this record as to the use of systematic and oppressive action by this agency of the government in pressing its competitive campaign.

Each of these devices is basically a transgression of federal function. Each is designed for the purpose of absorbing and dominating utility service in the area. None bears a reasonable relation to the exertion by the government of a lawful function. Each is pending and threatened as to petitioners' corporation. Each constitutes unfair and illegal competition.

(e) In addition, it is to be noted that the effect of this action is an arbitrary repudiation by TVA of licenses granted to petitioners' corporation by the federal government. Assuming, as may be true, that licenses under the Commerce Clause can not fetter the legislative function, it is nevertheless plain that these grants can not be destroyed by arbitrary action by this TVA board, for the purpose of transferring the going business established by petitioner's corporation under the licenses to the government. *Monongahela Nav. Co. v. United States, supra.*

At the instance and as an agency of the government, petitioners' corporation has improved navigation upon the

Coosa River in Alabama and has saved the government an investment to that end of approximately $15,000,000, without taking into consideration the cost of Lay Dam.*

The conditions have been met. It has submitted to public regulation, as contemplated by the license; it has established service in the area expressly contemplated by the federal grant and license. Now the government proposes direct conduct of a utility system within the same area at rates substantially below that to which it has, by this transaction, committed petitioners' corporation, to which the latter is, in fact, committed as a matter of law. This action of the government appears to be so grossly arbitrary as to be beyond the scope of legislative or administrative discretion. Certainly no such discretion has been delegated to this TVA. The procedure of the government in this matter is manifestly contrary to the spirit of fair play. *Monongahela Bridge Co. v. United States*, 216 U. S. 177, 195; *Monongahela Navigation Co. v. United States, supra; American Bank and Trust Co. v. Federal Reserve Bank, supra.*

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*Findings 21, 22 (II-1040) and 24 (II-1041-2) and 112 (II-1077). See also I-190-200. The three dams constructed by petitioners' corporation on the Coosa River are:

Lay Dam (Lock 12) constructed under Act of Congress approved March 4, 1907 (34 Stat. at L., 1288).—(I-190-2).

Mitchell Dam (Duncan's Riffle), constructed under License No. 82 of Federal Power Commission, dated June 25, 1921, issued under Federal Water Power Act (16 U. S. C., secs. 791-823), at a cost in excess of $5,000,000.—(I-192-6).

Jordan Dam (Lock 18), constructed under license No. 618 of Federal Power Commission, dated November 7, 1925, under 16 U. S. C., secs. 791-823), at a cost in excess of $10,000,000.—(I-196-200).

These three dams overcome a lift of 225 feet within a distance of 33 miles over a continuous stretch of the Coosa River.—(I-200).

V.

THE GOVERNMENT CORPORATIONS, ASSERTED ADMINISTRATIVE PRECEDENTS, AND RECLAMATION PROJECTS RELIED UPON BY TVA ARE NOT ONLY NOT SUPPORTING PRECEDENTS, BUT CONSTITUTE IMPRESSIVE RECOGNITION THAT THE ASSERTED POWER DOES NOT EXIST.

TVA relies upon the precedent of various federal authorized corporations and projects as sustaining the right of TVA to engage in commercial business, citing the national banks, land banks, Fleet and Spruce Corporations, and reclamation projects. The weight of the argument is directly opposed to the contention of TVA on this record. It would be indeed extraordinary, if any such collossal power existed, that it should have remained dormant for a century and a half.

We find nothing in these alleged instances to establish an administrative precedent adverse to our contention. That they constitute no "custom of the Constitution" is obvious. In the line of cases relied upon, as in every aspect of federal appropriation policy, there is to be found spending for a variety of functions accompanied by what has been in the past a general disposition on the part of the American people to acquiesce in experiments involving nothing more than temporary waste, local in character and not amounting to a systematic program. The more significant actions have had their base in war or disaster, further claims upon the indulgence of the people.

Instead of sustaining the TVA program, the facts affirmatively sustain the traditional interpretations for which we contend.

The impression had begun to prevail somewhat generally prior to 1933, that the Federal Government was unduly extending its activities into the field of production and commercial operation. The Shannon Committee Report* tabulates a formidable schedule. Yet the activities listed relate for the most part to the service of government requirements or activities within Federal territorial jurisdiction. These functions, with exceptions, some of which are noted in the margin,† were not competitive in the open market or were in general so clearly related to government use and consumption and therefore within the scope of Federal power, if not within the territorial and legislative jurisdiction of the government, as to present no important question of constitutional power, although presenting a question of political and economic policy of the first importance.

Up to the time of the present administration, provision of the instrumentalities of interstate commerce by land and water, justified as instrumentalities then not otherwise available under a combination of powers, with important aspects of that problem yet unadjudicated, along with the postal system and fiscal or treasury agencies, had been the principal occasion for government contacts in the commercial field, either directly or through corporate agencies privately owned and operating for profit. Reclamation projects and the Panama Railroad, confined to the public domain, are, of course, referable to the territorial jurisdiction of the Federal Government, are germane to the preparation of the lands for settlement and sale, and furnish no legal precedent for this program.

In adopting privately owned agencies operating for profit as agencies to perform functions of the Federal Government, first sustained in *McCulloch v. Maryland*, supra, there was an instinctive tendency on part of Congress to permit even governmental functions to be discharged, wherever practicable, in the stream of normal business. The functions of the treasury were not established as a completely organized departmental operation distinct from the banks until the Act of July 4, 1840, during Van Buren's administration.

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*Feb. 8, 1933. House Rep. No. 1985, 72nd Cong., 2nd Sess., H. Res. 235.

†Inland Waterways Corporation, Commissaries, Federal Farm Board and Farmers National Grain Corporation.

The national banks themselves, created by the government as fiscal agencies, have functioned in all substantial respects as competitive private corporations for profit, and have presented no material disturbance through government competition.

This practice of uniform forbearance by the Congress and the federal administrations, with certain clearly defined and traditional exceptions, has persisted from the beginning.

It survived the high pressure of the Civil War. It continued without change of policy through the Federal Reserve system, the twelve banks being owned by commercial banks and operating for profit. The nation met its responsibility in the World War with the formation of some six government-owned corporations.* These agencies began in good faith the effort to liquidate as soon as their war purposes were terminated. The result was not only keeping faith with the Constitution, but a consistent restraint of Federal function and expense resulting in curtailment of the public debt.

The War Department, warned by experience, has long since adopted the policy of looking to the organization of

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***Emergency Fleet Corporation, United States Grain Corporation, United States Sugar Equalization Board, War Finance Corporation, United States Housing Corporation, United States Sp[illegible] Corporation, and Russian Bureau, Inc.**

industry for its war supplies (Fng. 107, II-1073), thus relieving the military establishment of the grave economic problem of abnormal liquidation and industrial confusion which on termination of the war would follow extensive assumption of industrial function by the government, as well as of the perennial temptation to utilize the plants for some form of national collectivist production so unhappily illustrated by the nitrate and steam electric and hydroelectric plants at Muscle Shoals.

The little discussed provision of the Constitution (Art. I, Sec. 8, Cl. 12) prohibiting appropriations for the support of armies for a longer term than two years stands as a declaration of policy if not a more effective prohibition against commitment of the government to the establishment of a permanent mechanism intended to operate as a war plant during time of war, with the idea that it may be devoted by the government itself to permanent commercial production in competition with citizens during time of peace.

Following the war only two governmental corporations were authorized by Congress until the Hoover Administration.* During the Hoover administration, the Reconstruction Finance Corporation and Home Owners Loan Corporation were organized as depression measures. And then the deluge. A partial list, omitting direct or departmental agencies such as Public Works Administration, AAA, &c., is set out in the margin.† Many corporations were organized pursuant to executive order under the forms of state law.

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*Federal Intermediate Credit Bank (1923), 43 Stat. 1454-1492, and Inland Waterways Corporation (1924), 43 Stat. 360.

†Banks for Cooperatives, Commodity Credit Corporation, Electric Home & Farm Authority, Inc., Export-Import Banks, Federal Credit Unions, Federal Deposit Insurance Corporation, Federal Farm Mortgage Corporation, Federal Prison Industries, Inc., Federal Savings and Loan Associations, Federal Savings and Insurance Corporation, Federal Surplus Relief Corporation, Home Loan Banks, National Mortgage Associations, Production Credit Corporations, Public Works Emergency Housing Corporation, Regional Credit Corporation, Tennessee Valley Authority, Tennessee Valley Associated Cooperatives, Inc.

The corporate, non-governmental absolutism granted to the Tennessee Valley Authority carries this practice to a high water mark and constitutes a clear abuse of the corporate agency as a device not so much to provide immunity from the general accounting office as from the Constitution.* On that summary of the record there is no justification for the contention that there has been established any custom of the Constitution to support this program. The contrary is the implication. That being the general background, we pass to brief analysis of the specific instances relied upon by TVA below.

There Is a Vital Distinction Between the Commercial Powers, Including Competitive Functions, Which May Be Granted to a Private Business Corporation Created or Adopted as a Federal Agency, and Exercise of Such Powers by the Government.

The success and survival as fiscal agencies of the treasury of the national banks, operating as privately owned and operated banking institutions, is said to be dependent upon their ability to compete fairly with like institutions organized under state laws. On this conclusion the court has justified what is perhaps the most extended application by Congress of the "necessary and proper clause" of the Constitution, namely, that where state laws unite the function of administering trusts and estates with the banking functions of state banks, the extension of those same functions to national banks is appropriate and within the power of Congress in order to enable them to survive against competition or perhaps to protect their competitive status from the effect of restrictive or discriminatory legislation by the state.* Clearly, no such power could have been claimed either for the government or for a wholly owned government corporation, since profits from commercial competition have no relation to the survival of the government or to the administration of the treasury or consist with the letter and spirit of the Constitution.

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*In United States Shipping Board Emergency Fleet Corporation v. Western Union, 275 U. S. 415, and in Skinner & Eddy Corporation v. McCarl, 275 U. S. 1, the device of the corporate agency for the execution of federal powers was recognized as intended to provide flexibility in connection with the expenditure of funds. Certainly it was not considered that the flexibility could be justified as a device to extend federal function; as claimed by this amazing and omnipotent agency, professing Messianic scope but admitting that it is willing to get results by satanic means, that is, without compunction: Lilienthal to Willkie, II-515-6.

Even in the case of federal agency corporations privately owned and operating for profit, Chief Justice Marshall asserted that the corporate powers granted must have relation to the federal objective.†

So-Called Precedents Where No Remedy Existed Are Not Judicial Precedents.

Federal action which is not justiciable (*Massachusetts v. Mellon,* 262 U. S. 447) can claim no estoppel from acquiescence.

As was stated by the Court in *Myers v. U. S.*, 272 U. S. 52, 170-171 (1926):

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*First National Bank v. Fellows ex rel. Union Trust Co. (1917), 244 U. S. 416; Missouri v. Duncan (1924), 265 U. S. 17. As to Federal land banks, Smith v. Kansas City Title & Tr. Co. (1921), 255 U. S. 180; Federal Land Bank v. Gaines (1933), 290 U. S. 247, and Federal Land Bank v. Priddy (1935), 79 L. ed. Adv. Ops. 709, alike assert that these banks "are instrumentalities of the Federal government, engaged in the performance of an important governmental function." Plainly the extent to which this line of cases will permit Congress to go in authorizing powers to corporations which the government could not claim for itself, calls for more definite demarcation than is to be found in the cases cited.

†Osborne v. Bank, 9 Wheat. at p. 860—"It would be hard to contend that Congress had the power to authorize a bank to carry on a general business if that business were not necessary to the proper functioning of the bank for national purposes."

> "In the use of Congressional legislation to support or change a particular construction of the Constitution by acquiescence, its weight for the purpose must depend not only upon the nature of the question, but also upon the attitude of the executive and judicial branches of the Government, as well as upon the number of instances in the execution of the law in which opportunity for objection in the courts or elsewhere is afforded. When instances which actually involve the question are rare, or have not in fact occurred, the weight of the mere presence of acts on the statute book for a considerable time, as showing general acquiescence in the legislative assertion of a questioned power, is minimized."

In *United States v. Boyer*, 85 Fed. 425, the Court said:

> "The learned counsel, in this connection, has cited various acts of Congress of a nature quite similar to the one in question, but no number of statutes or infractions of the Constitution, however numerous, can be permitted to import a power into the Constitution which does not exist, or to furnish a construction not warranted. They, too, must stand or fall, when brought in question, by the same principles which are to be applied alike in all cases."

These assertions are sustained and illustrated by similar expressions in *Field v. Clark*, 143 U. S. 649, 691; *Maynard v. Hill*, 125 U. S. 190, 204; *Fairbank v. U. S.*, 181 U. S. 283, 306-311; *Miles Planting Co. v. Carlisle*, 5 Appeal Cases District of Columbia 138, 161.

Compare *Panama Refining Co. v. Ryan*, 293 U. S. 632.

Emergency Fleet Corp. v. W. U. T. Co., 275 U. S. 415: The Fleet Corporation was a department of the government in the form of a suable corporation, wholly owned by the government and as such, all of its fiscal transactions being for the account of the U. S. Treasury, was held entitled to the government scale of telegraph rates established by agreement between the Telegraph Company and the government under the Post Roads Act of July 24, 1866. That is all that was decided. The Telegraph Company did not raise the question of power of the Fleet Corporation to operate or to send the messages. The use or abuse of the war power was not considered.

The Fleet Corporation was the agency for liquidating as a going concern and maintaining in operating condition vessels acquired for war purposes. Operation of owned vessels pending disposition may be germane to the maintenance of their good will, value and condition. The finding of fact (No. 43, II-1048) is to the contrary as to the TVA plants in this case.

We are dealing here with a region-wide or nation-wide commercial manufacturing program; not an instrumentality of commerce, but commerce itself, local, monopolistic, arbitrary and unrelated to the regulation of navigation or any other power.

Nor is there any precedent adverse to our position in the reference by the Court in the *Western Union Case* to other federal departments in business which had been accorded the "government" rates by the telegraph company, although they also had competed with private business, such as:

Post Office: Money orders and parcel post functions are clear and direct postal functions within the scope of the Constitution. Savings accounts are distinctly not a postal function. If the postal savings system were dependent on the post clause, it would have been subject to challenge. Postal savings constitute a fiscal or borrowing function, which Congress could delegate to the postal department for operation.

War Finance: This agency has not been challenged. It is on the border or **spending** line, saved possibly by the war or fiscal power or indifference. There was no one to complain, and no one did complain.

Barge Lines:* These are **instrumentalities** of interstate commerce, originally intended to be of temporary use as a demonstration of the water ways, with the definitely expressed purpose, as reported by the Committee, to dispose of the property.† Forbearance in challenging the operation was undoubtedly due to this assurance. It was not authorized to enter into 20-30-50 year contracts and can be disposed of at any time.

The Shannon Committee Report, supra, has recommended (pp. 21, 37) that the service be "discontinued and liquidated by sale to private enterprise."

The extension of the experimental operation by Congress in 1928 was until (a) completion of the navigation projects authorized; (b) completion of adequate terminal facilities; (c) the establishment of joint rail and water tariffs and until "private persons, companies, or corporations engage, or (are) ready and willing to engage, in common carrier service on such rivers; then the lease or sale of the facilities under stated conditions is authorized."

We have elsewhere pointed out the distinction between providing and maintaining a facility of interstate commerce and conducting the business of commerce by means of the facility *(Detroit International Bridge Co. v. Appeal Board, supra)*. The suggestion of TVA that continued or permanent operation of this barge line in interstate and intrastate commerce is accepted and final as a function of government in view of the representations made as to its tentative or experimental character, is by no means justified. The argument and the illustration of TVA is a very good one for bearing in mind the principle of *obsta principiis*, if the constitution is to be preserved.

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*Inland Waterways Corporation, 40 Stat. 360 (1924).

†"If the government, after making these rivers navigable, cannot profitably operate a transportation system on them, then it is hopeless to expect private capital to do so, and Congress should no longer appropriate money from the Public Treasury for a useless purpose. Therefore the committee was of the opinion that this bill should pass in order that this pioneering demonstration might be conducted by the Secretary of War until such time as its success or failure may be made apparent."

The Pacific Railroads: Were authorized at a time when facilities were lacking and were obviously beyond the means of the States or their citizens. There existed a reasonable relationship between the construction of those properties and the service of commerce or, at least, a combination of the war, postal and commerce clauses.

They escaped serious questioning by reason of the fact that their property and intrastate affairs were from the outset subjected to the tax and police powers of the States, a result which this Act truculently rejects; and no competitor raised the question in the case of the railroads.

The *Central Pacific Railroad Case*, 127 U. S. 1, and *Luxton v. North River Bridge Co.*, 153 U. S. 525, recognize the power of Congress either to authorize corporations to construct national highways and bridges or itself to construct such instrumentalities as essential to the complete control and regulation of interstate commerce, but there is no decision of the court to warrant the assured statement that Congress can, outside of the maintenance of the instrumentality for interstate commerce, also operate it **under the commerce clause** to handle local business or to engage in commercial manufacture and shipping over the instrumentality in the face of justiciable objection.

The taking over of the railroads for wa[illegible]n their entirety, was within and executed under the war power. It was, for obvious reasons of necessity, acquiesced in. Any road which successfully challenged the validity of the legislation or the emergency seizure as to its own property (clearly not adequate against attack until the Federal Control Act was adopted) would have been broken on the wheel of competitive federal deficits. Any contention by TVA that its program, region wide and perpetual, is justified as a war function would be grossly unjustified.

Nothing in the "instrumentality" cases remotely warrants the contention that the government can, in order to reimburse the cost of acquisition of a given aid to commerce, directly engage as a manufacturer or trader in railway supplies, establish and operate commercial steel and lumber mills and dispose of a "surplus" output vastly in excess of the requirements of the railways and five times the total market for such products in the United States.

The instrumentality of transportation or commerce is one thing; operating the instrumentality is another; engaging in trade, in order to make business for the instrumentality, is a third; and so far as the federal government is concerned it is prohibited.

In the case of *Clallam County v. United States Spruce Corp.,* 263 U. S. 341, there was organized a state corporation for the purpose of liquidating a large investment of the government made for the production of spruce products for war purposes. The question was whether during the liquidation of the investment the government had overstepped its governmental purposes and had converted it into a proprietary enterprise, thus rendering the property subject to taxation by the State. The court pointed out that the original activities of the corporation were wholly directed to the government's program of production of aeroplane lumber, and that

> "after the Armistice these activities have been directed to liquidating the corporation's affairs, although to accomplish it some further contracts have been made, but, as we understand, **solely for that end.** * * *
>
> "In short, the Spruce Production Corporation was organized by the United States as an instrumentality for carrying on the war, all its property was conveyed to it or bought with money coming from the United States, and was used by it solely as a means to that end, and when the war was over it stopped its work **except so far as it found it necessary to go on in order to wind up its affairs.**" (Emphasis supplied.)

The final distinction in all cases, whether the government is proposing to act directly or through a wholly owned agency, or when using a private-profit agency, is that the asserted power must relate rationally and directly to the final objective and not to the promotion of some non-federal aim, and, after all and above all, the means and the objective must consist with the traditional conception of the division of powers established by the Constitution.

None of the instances relied upon by TVA in any remote degree sustain its organization or its program.

The So-Called Precedent of Reclamation Projects.

The situation stated above is peculiarly applicable to the administrative precedents relied on by the TVA in connection with reclamation work upon the public domain.

Disposing of the public lands under the property clause (Art. IV, Sec. 3, Cl. 2) of the Constitution obviously justifies that they be made habitable. While it is held that the fact that these lands lie within the borders of a state does not prevent the government from joining with private land owners in an irrigation project (*Burley v. United States*, 179 Fed. 1), that conclusion and decision do not in any respect militate against the finality of the principle of sovereignty asserted when this Court denied intervention to the government in *Kansas v. Colorado*, 206 U. S. 46.

On the contrary, the opinion in the *Burley Case* is direct authority for the principle for which we contend. Referring to the statement in *Kansas v. Colorado* that "it would be strange if, in the absence of a definite grant of power, the national government could enter the territory of the states along the Atlantic and legislate in respect to improving by irrigation or otherwise the lands within their borders," the Court in the *Burley Case* repeated the reference above made and stated:

> "That is to say, it would be strange if the national government could enter the territory of a state where there were no public lands of the United States requiring irrigation of arid lands, and by legislation provide a system of irrigation for the private lands within the state and control its administration. It would indeed be a strange proceeding and obviously wholly outside of the authority of Congress."

Now, that is taking place. This TVA network is within state domain. It is not for the purpose of serving public lands. It is, baldly, the effort to treat the area as public domain.

It is asserted in *Twin Falls Canal Co. v. Foote,* 192 Fed. 583, that the government in prosecuting reclamation enterprises is not primarily performing a governmental or, strictly speaking, even a public function, but is promoting a proprietary interest; meaning, of course, that it was acting under its territorial legislative powers. These are assimilated to the municipal powers of the State, and if the Reclamation Service has crossed the lines upon insignificant occasions and to an insignificant extent, there is no general notoriety of the function, and it is amazing that the government of the United States should assert that the States and the people of the nation have lost their constitutional right to be protected against governmental monopoly as a result of obscure violations of federal function of which they have never heard and as to which they had no justiciable remedy. An effort to ascertain precisely what distribution of power is being operated outside of reclamation projects by the Reclamation Service, was able to elicit no tangible information, inquiry having been referred to Denver. The deviation reflected in this so-called precedent, if it exists at all, is trifling and inconsiderable. The suggestion that this so-called departure by the Reclamation Service is the progenitor of TVA has been publicly disavowed by the Authority in these words:

> "The Tennessee Valley Authority Act marks the beginning of a new national power policy and national power program. This new national policy has two major objectives. The first objective is more effective protection of the public interest, by the setting up of a measure of public operation of power as a 'yardstick.' The second objective of this new national policy is a greatly increased use of electricity in the homes, the farms, and the factories of the United States—an electrified America" (II-606).

We were unable to confirm at the Reclamation Service any consciousness of its responsibility for the phenomenon.

VI.

THE ACTION OF TVA IN FURTHERANCE OF ITS PROGRAM IS CHARACTERIZED BY ARBITRARY ADMINISTRATION OF THE POWER AND RESOURCES OF THE GOVERNMENT AND CONSTITUTES ILLEGAL ACTION AND COMPETITION.

The Act, by reason of its indefinite character, referred to below in the discussion of its validity on the specific ground of delegation, holds out unlimited authority to this agency to carry into effect the commercial power program. That was what the President requested (Statement of Facts, supra, p. 8); that was granted. It is perhaps the first utility in American history to begin with a program of creating vast accretions of power for commercial sule in a market over-supplied.*

Faced with this economic anomaly, the TVA board has felt compelled to move with the rapidity necessary to keep in favor a project not based on any normal market development or requirement. The obvious methods were those employed.

They included constant propaganda, incitation of the public, spectacular literature and financing of appliance items to indicate extensive increase in consumption, well

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*It was stipulated that petitioners' corporation had power capacity of 54% in excess of its market (II-391). The TVA minutes (II-541) recognized that the entire market was fully supplied (Statement of Facts, supra, p. 32); and the facts on which TVA based its program were publicly stated in the public release found on pp. 606-613 of the Record, viz.: "It is perfectly evident that we now have and soon will have a tremendous supply of electricity. Within the area of the Tennessee Valley, for example, privately owned electric companies have generating and transmission facilities which can care for between 30% and 40% more demand for electricity than is now required, even allowing for reasonable spare capacity * * * We are then faced with this situation. We have and are in process of constructing a tremendous pool of power for the nation * * * A large portion of the power facilities will be idle and unused" (II-610, 612).

calculated to appeal to family rivalries; and, always, the readiness of the government (TVA) to contract for a generation for delivery of electricity at greatly reduced rates, and to purchase systems directly or through PWA for local communities if they would vote for competitive projects, allowing them to be amortized out of earnings.

It is a fair statement to make that this record shows a course of arbitrary action without precedent in America.

The releases referred to on page 42, supra, plainly and expertly designed as an incitant to the option of August 9, are in the same formula employed in the heart of Commonwealth and Southern territory while the negotiations were in progress for that group of properties. These releases were widely distributed by TVA throughout the region and extensively quoted. Working up through the evils of the utilities in the past, the thesis stands firm on the hypothesis that

> "there can be no question that in the last decade the power business was dominated by financial pirates * * *" (II-608).

And so—

> "The people back home have a way of remembering. It is that memory which accounts for the fact that no measure sponsored by the President has behind it so determined a body of public opinion as supports the power program of the Tennessee Valley Authority" (ib.).

As a conclusive index of the system employed, or as expressed in the minutes, the "technique" of acquisition, there is found a deadly regional harmony between the procedure used at Knoxville to obtain a contract of sale from the Tennessee Public Service Company* and the means

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***Statement, ante, p. 42. See also the opinion on demurrer of the Chancery Court of Knox County, Tennessee, Appendix p. 124, quoting matters of public record.**

used to bring about the Commonwealth & Southern agreement. The release of January 5, 1934 (II-620), announcing the contract of January 4, for purchase of the Power Company's lines by TVA, is pregnant and illuminating. It properly refers to the territory involved as "the ceded area" (II-621).

It calls attention to the fact that "obviously the Authority could not undertake to serve all of the two hundred communities who were applicants" (ib.).

It made this statement, which is significant of the entire record:

> "Had the power companies who are parties to this contract been unwilling to sell these facilities at a fair price, or had they insisted on payment for intangibles or 'water,' the Authority would have been under a definite mandate to construct duplicating facilities rather than submit to being 'held up.' "

We have referred to the identical circumstances under which the option agreement of August 9, 1934, was taken (Statement of Facts, supra, pp. 42-43), the option being given at the price offered by TVA (60% of its stipulated replacement value).

There can be no doubt on this record, after a reading of the minutes and the greatly abbreviated excerpts set out in the record from the public releases of the Tennessee Vally Authority (II-531 to 656), that this agency, without any species of regulation or corporate accountability, has proceeded to do what it conceives to be necessary to ripen the mind of the public for the conception and to make it effective by progressively taking the market as the sources of power became available.

There is no reason why the standard of compensation paid the companies as established on this record (60% of stipulated replacement value) without any allowance for an energized system with customers attached* should not be progressively extended until they are exhausted. That result would leave the preferred stock of petitioners' corporation, issued at 92 or better, without value.

That being the basic outline of the plan and the disposition underlying it, and the power to make it effective, there stand united all of the characteristics of arbitrary action, exemplified on this record.

Congress declined the recommendation of the House Committee on Military Affairs, made at the time of the consideration of the Amendment requested by TVA, that would have required TVA, in the event of disagreement with existing utilities whose area was proposed to be taken over, to condemn the lines and pay just compensation in the traditional American method where parties disagree. Congress declined that proposal; Congress declined other proposals to afford some element of protection to the utilities in the area faced with attrition by the program.

The story of TVA's use of PWA loans to bring about the acceptance of its terms can be characterized in no other manner than as an abuse of the power and resources of the government. The record is conclusive that the Public Works Administration has cooperated to that end.†

The TVA conception is not only in violation of federal function; it is a direct encouragement of arbitrary power and a definite illustration of the exercise of oppressive methods against the citizen.

It falls squarely within the principle held actionable as against an agency of the government in *American Bank and Trust Company v. Federal Reserve Bank of Atlanta*, 256 U. S. 350, in which Mr. Justice Holmes said:

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*II-620, quoted above.

†Statement of Facts, supra, pp. 21 (note), 41, 43, 44.

> "If this were a case of competition in private business it would be hard to admit the justification of self-interest considering the now current opinion as to public policy expressed in statutes and decisions. But this is not private business. The policy of the Federal Reserve Banks is governed by the policy of the United States, with regard to them and to these relatively feeble competitors. We do not need aid from the debates upon the statute under which the Reserve Banks exist to assume that the United States did not intend by that statute to sanction this sort of warfare upon legitimate creations of the States" (pp. 358-9).

The basic aspects of direct commercial operations by TVA are contemplated by the Act and are the more definitely emphasized by the Amendment; and as statutory provisions are subject to this analysis; but to the basic infirmities in the dominant purpose and effect of the Act, the Tennessee Valley Authority has added characteristics in detail and pattern that are bald in their repudiation of the theory of fair play and of the limitations dictated by the American system upon federal function and upon arbitrary power.

This anomalous Board, holding office by appointments ranging up to nine years, has brought to bear a systematic plan of execution arbitrary in character, subject today to no revision by any agency on earth, involving the government in a permanent and inextricable network of utility service, conducted with unctious cruelty against the investment of petitioners.[*]

To the patent transgression of federal function con-

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[*] From David E. Lilienthal to Wendell L. Willkie, June 20, 1934:

"The Tennessee Valley Authority believes that the acquisition by it of your properties in the allocated area in North Alabama will be a constructive method of meeting a situation which is difficult and which inevitably will lead to bitter feeling and the wastes of competition. The public interest is, therefore, directly involved, and I consequently feel templated by the Act, we find in this record the drumhead action of summary boards discussed in *Ex Parte Milligan* and *Yick Wo v. Hopkins.*

VII.

THE TENNESSEE VALLEY AUTHORITY ACT OF 1933 AS AMENDED IS UNCONSTITUTIONAL BECAUSE OF THE DELEGATION OF LEGISLATIVE POWER.

This phase of the record has been grazed in discussion of various details of the TVA program. We therefore content ourselves with an outline of the transgressions by the statute of the legislative function. *Panama Refining Co. v. Ryan, supra; Schechter Poultry Co. v. U. S., supra.*

We are not concerned with the social objectives or mere waste of federal funds, but with the dominant, underlying objective of the entire conception, both Act and program, without which, asserts its sponsor, Senator Norris, "the dams might as well be blown up''; that is, the commercial power program.

Reference has been made to the President's Message requesting that the powers of government be conferred upon the Tennessee Valley Authority, "but possessed of the flexibility and initiative of a private enterprise"; also to the fact that the Tennessee Valley Authority has interpreted the Act as fully justifying that complete elasticity.*

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*TVA Press Release of July 18, 1933 (II-585): "The law gives to these directors powers of the greatest breadth and flexibility—powers almost unheard of in ordinary governmental departments. * * *

"* * * The President has said that the corporation is to have the flexibility of a private business corporation. No other conditions will permit of the accomplishment of his objectives. * * *" (Emphasis supplied.)

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none of the compunction which I might feel as a private individual in urging you earnestly to re-examine this matter with a view toward a constructive solution" (II-515). Then followed the public incitation above mentioned (II-639).

And so, seven days later "in view of existing circumstances" the option was given at the dictated price (II-516).

The fundamental question here so far as the Act is concerned is whether or not the Act itself, as distinguished from the palpable transgressions of Constitutional power by TVA in its administration, attempts such organic and inseparable delegations of legislative power that, notwithstanding the separability clause in the Act, it can not be presumed that the Act would have been adopted had they been omitted.

The Act delegates legislative authority to TVA to determine at will the nature and type of improvements for regulating navigation in the Tennessee River. This delegation is substantially unlimited. It was supported by an open authorization of $50,000,000 of bonds to rove up and down the reaches of the river and its tributaries in the establishment of commercial power units, impassable power dams, or any other improvement within the broad scope of the statute.

The amendment to the Act by Section 2 (Appendix) took cognizance of the fact that nine foot navigation was to be provided, which already had been determined by Congress, but by a series of low dams.* The amendment also took cognizance of the pending construction of Wheeler and Pickwick, but has in all other substantial respects left to TVA unlimited legislative discretion to determine the matter of location, type, design, and extent of lands to be taken; the question whether generating units are to be installed or not, and if installed, the question of their commercial operation; the entire problem of the establishment and extension of utility systems, all matters relating to binding contracts to endure up to 20, 30 or 50 years; plainly unlimited discretion over the appropriation of public monies coming into the hands of TVA either as a result of appropriations or as receipts from operations; the extent to which TVA may make donations to the States under Section 13 of the Act, in lieu of local taxes lost to the communities and counties and the extent to which TVA would, by its program, drive out regulated and taxable utilities and dry up one of the principal sources of state taxation.

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*Rivers and Harbors Act of July 3, 1930, 46 Stat. 918, 927-928; House Doc. 131, 72nd Cong., 1st Sess.

All of these questions are matters certainly of the highest legislative consequence, both to the state domain penetrated and to the victims. If a bill of attainder as to local utilities is to be enacted, in spite of *Yick Wo v. Hopkins* and the Constitution, let it be in traditional fashion by a legislative assembly and not by a frontier Board unctiously furthering Aryan regeneration in the Tennessee Valley. The minutes and probably every official release of the TVA on this record make plain that the introduction of its program was intended to have and was likely to have the most far-reaching consequences in the areas involved, transforming (so it was intended) both geographically, economically and socially, the region.*

Petitioners submit that delegation of function of this character to a corporation of this type constitutes government by that corporation instead of by a Congress charged by the Constitution with the duty and responsibility of legislation. This record shows the result of the arbitrary action to be expected as a result of any such free hand.

The Act lays down no test, standard or direction for the execution of matters of this extraordinary scope.

This is not the case of the delegation of authority to determine the location of and to construct a plant for some governmental purpose. This was, as the President requested and as the Act intended, the authority to have the powers of government and to plan for an entire region, and to carry that plan into execution. The delegation confronting the Court in the Panama Oil Case was trifling in comparison with the delegation shown by this record. "The power program of the Authority is an inseparable part of an integrated plan for the development of this great region" (II-605, et passim).

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*"The Authority is embarking on a hydro-electric program which will completely change the physical structure of large sections of the Valley, and will affect every part of it. Extensive rearrangement of the highway system and of railroad lines will be required. Other parts of the program, coupled with the operations of other Federal agencies, will alter established modes of living, change farming methods and industrial operations, make substantial changes in the ownership and use of land, and cause major shifts in population."—TVA Minutes, March 30, 1934, II-559.

VIII.

THIS STOCKHOLDERS' SUIT WAS PROPERLY ENTERTAINED BY THE DISTRICT COURT AND BY THE CIRCUIT COURT OF APPEALS.

Certain of the basic facts on which the stockholders' suit was entertained by the District Court and by the Circuit Court of Appeals are set out in the findings of the District Court: Findings Nos. 3, 5, 6, 7, 9, 10, 11, 15, 16, 17, 18 and 19 (II-1036-1039).

That the management yielded to the threat of the Tennessee Valley Authority that it would employ the illegal means shown on this record to bring about the competitive displacement of the Power Company, accompanied by the announced policy and overt acts of other branches of the government, is not to be doubted. We discuss elsewhere the methods of coercion and the other means constituting illegal methods of competition systematically employed and threatened by these governmental agencies, their arbitrary and anomalous character.

Finding No. 19 was as follows:

> "19. Assuming the invalidity of the TVA power program or of its acquisition for operation of the proposed properties, the failure of the Alabama Power Company to withdraw from participation in such illegal objectives assuring immediate (and threatening progressive) loss of franchises, business and service area, involved a breach of duty on part of the management and Board of Directors." (II-1039.)

The Threat of Estoppel and the Emergency.

A phase of the grave situation confronting the stockholders and their corporation, with its management stunned by the public tension aroused by the Administration in 1933-1934 behind its NRA-TVA programs, was the question of estoppel. Persistently, both in the District Court and Circuit Court of Appeals, TVA has urged that the Alabama Power Company was estopped to claim sanctuary under the Constitution as a result of having dealings with TVA, and by the contract of January 4 itself. Obviously a contract necessarily in its execution violative of the fundamental public policy of the Constitution should be annulled, and there can be no estoppel to continue performance so long as it is executory. While estoppel will never be enforced to effectuate an unlawful action, or to defeat a lawful prohibition, being regarded in such case as against public policy (*Lurton, J., in McCutcheon v. Merz Capsule Co.,* 71 Fed. 787, 796), yet TVA, in the high speed of its program was, under cover of the contracts and until this suit was filed, unmistakably consolidating the region, lacing in petitioners' corporation with relationships and supposed benefits and elaborating the daily additional elements of so-called estoppel which would have gravely embarrassed the challenge of the program until it was too late. It has tied into the contract of January 4, an agreement to have relations with this TVA installment promotion agency (EHFA) (Fng. 101, II-1071, Concl. of Law 26, II-1100); and had this suit not been filed, it is plain on this record that TVA would have broken the center of petitioners' corporation. On the face of it the contract of January 4 was an adequate ground, but it was only a single unit in the plan of demoralization and retreat. It was the grinding crush of the program of competition in its entirety which should have been resisted at the outset.

The suggestion of TVA that with the avalanche of this program closing in, they should have waited until their corporation was caught inextricably, is not to be accepted. This show-down came not a day too soon, either in the interest of the corporation or of the public.

For the management to yield to the program under those conditions was suicidal; but that was the position in which the stockholders found it. The suit was obviously indispensable.

Contracts of January 4 and August 9, 1934.

The contract of January 4, 1934, called for the transfer of utility properties for the sole and express purpose of continued utility operation by the federal government (Finding 89, II-1068, Statement, supra, p. 127).

Section 4 of the contract provided for the transfer of the franchises, contracts and going business, with all customers attached.

Section 7 by practical and necessary result and by direct covenant assured to the government a monopoly of utility service by a covenant of the Power Company that it would not sell to any "municipality, corporation * * * or individual'' in any portion of the ceded area. This was necessarily an illegal covenant not to respond to the utility obligations of the Power Company within the area of its undertaking, even as appurtenant to those of its transmission lines in the ceded area which were not to be sold.

Assuming the invalidity of the assumption of utility function by TVA under the circumstances shown on this record, the direct and necessary effect of the contract was an affirmative violation of the Tenth Amendment.

Under these circumstances the management of the Company was under the duty "both to its stockholders and to the public to rescind and abandon the contract at the earliest moment.'' *Central Transportation Co. v. Pullman Co.*, 139 U. S. 24, 55.

The right of the stockholder to file suit under these circumstances, after bona fide demand upon the management, is fully established.

Hill v. Wallace, 259 U. S. 366;
Dodge v. Woolsey, 18 How. (59 U. S.) 331;
Chicago v. Mills, 204 U. S. 321;
D. & H. Co. v. Albany etc. Co., 213 U. S. 435;
Ex Parte Young, 209 U. S. 123;
Greenwood v. Un. Fr. R. Co., 15 Otto (105 U. S.) 13;
Smyth v. Ames, 169 U. S. 466;
Pollock v. Farmers Loan & Trust Co., 157 U. S. 420 (158 U. S. 601);
Cotting v. Goddard, 183 U. S. 79;
Smith v. Kansas City Title & Trust Co., 255 U. S. 180;
Brushaber v. Union Pacific Ry. Co., 240 U. S. 1.

This right was sustained on both appeals, and the case presents no question of federal jurisdiction which would not otherwise have attached (the suit having been instituted in the State court and removed by TVA). The case is presented on a complete record, accompanied by full and adequate findings and conclusions of the trial court. The record contains unmistakable evidence that the management in yielding to the program in the first instance was acting under compulsion and has formally stated on this record* that the Power Company neither challenged the right nor the propriety of the stockholders' suit, and that

> "Relief, whether by way of declaratory judgment (as prayed specifically by the amended bill, R. III, p. 1278), and reserved for supplemental consideration by the District Court (Conclusion No. 27, R. II, p. 1101), or by a decree more fully related to the facts as they existed at the time of the decree (via threatened duplication by federal loans for competitive systems to be operated by or under privity with, control and domination of TVA), seems not only appropriate but essential to the orderly disposition of this grave controversy."

All Parties Before Court on Full Record.

All parties are before the Court, including the mortgage trustee, the Chemical National Bank, which has in like manner sustained by its memorandum on the petition for writs of certiorari, the grave corporate and public necessity for adjudication of this controversy on the record.

It is obvious on this record that the management of the corporation yielded under pressure of TVA and of other agencies of the government,† that the filing of this suit made plain and vulnerable the illegality of the program, that direct action by petitioners' corporation has, practically, been suspended by the adjudication of the basic question of legality by the District Court, which, so far as the right to sue is concerned, was accepted on that point by the Circuit Court of Appeals. Dismissal of this suit on a technical ground raised solely to make effective further encroachment on the Tenth Amendment would be tragic. It would but force a new suit and a duplication of this large record which must, in the end, come to this Court for decision.

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*Memorandum on behalf of Power Company in response to petition for writs of certiorari.

†It was argued below by TVA that the corporate management had a choice, and that it was in the interest of the corporation to enter into the contracts. Aside from the fact that this view ignores the certainty of competition outside the area covered by the contract, Mr. Justice Holmes has answered such an argument:

"It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called." *Union Pacific Ry. v. Pub. Serv. Comm. of Mo.*, 248 U. S. 67.

The practice observed by this Court in *Pennsylvania Coal Co. v. Mahon,* 260 U. S. 393, at p. 414,* is plainly indicated here.

In *Wilson v. Shaw,* 204 U. S. 24, the Court declined to give serious consideration to technicalities where a fundamental public question absolutely and inevitably requiring determination was fairly presented on facts adequate to their full consideration and decision. It is also to be borne in mind that the technicalites advanced are brought forward by the agency charged on this record and adjudged by the District Court on the findings to be engaged in a systematic and permanent violation of constitutional function, an agency which admittedly changed its nominal position as to the urban utility distribution systems within the seventeen defendant towns (involved by the contract of August 9) for the purpose of attempting to make the controversy a moot one while pressing to the same result by the device of so-called loans to the municipalites. The Attorney-General requested the advancement of submis-

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*"But the case has been treated as one in which the general validity of the act should be discussed. * * * It seems, therefore, to be our duty to go farther in the statement of our opinion, in order that it may be known at once, and that further suits should not be brought in vain."

sion because of the public importance of the cause and the assertion that its pendency is interfering with the program of the Tennessee Valley Authority. That agency, according to the public press, is daily pressing its commercial program in the area.

Under these circumstances we cannot assume that the Tennessee Valley Authority will continue its unsuccessful challenge of the propriety of the stockholders' suit, and will curtail the remainder of our argument on the point in question to a bare outline of what appear to be decisive reasons why the technical contentions made below by the Tennessee Valley Authority are not tenable as to the matter. If TVA shall further attempt to defer the adjudication, we shall ask leave to extend our documentation on the point.

The decisions heretofore cited by TVA for the most part were based on insufficient preliminary protest or necessity for a stockholder's suit, lack of parties, or palpable effort to confer jurisdiction upon the federal court, and it is not to be doubted that under the Hawes Case (*Hawes v. City of Oakland,* 104 U. S. 450), principally relied on by TVA, the court recognizes that in addition to *ultra vires* action by the corporation, other cases exist in which the stockholder is entitled to maintain suit "to prevent irremediable injury or a total failure of justice" (ib. p. 460).

Acts which are designed to accomplish a result so contrary to public policy as complained of in this proceeding and so decisively destructive of the corporate franchises, properties and rights of the corporation, fall within the principles stated in any of the cases.

A relationship directly and necessarily tending to the accomplishment of an enduring violation of the Constitution and of the public policy of the United States, in fact destructive of our system of government and certain to result in the progressive annihilation of the corporation itself, plainly presents a case for stockholder action, where the management has been brought to its knees under the circumstances shown on this record.

THE ALABAMA POWER COMPANY COULD HAVE MAINTAINED THE SUIT.

Since a stockholders' suit is derivative and can be entertained in general only where the corporation itself may sue, we state briefly the argument in support of the propriety of corporate attack on the TVA program shown by this record.

It must be borne in mind that the relief here involved is protection from absorption by TVA of franchises, business, and in fact the existence of the Alabama Power Company, accomplished through a diversity of means and under constant shifts in position by TVA in jockeying for immunity from judicial accounting; that these means include, *inter alia,* the contract of January 4, and illegal competition both directly and through municipal agencies of TVA, through government investments, dominating operations pending liquidation and beyond; and by like means commented upon above.

The Power Company obviously shows special injury within the meaning of *Frottingham v. Mellon,* 262 U. S. 447, and on general principles is entitled to relief from a program based upon competition involving continuing violation of the Constitution and continuing and progressive detachment of customers and business.

Texas & N. O. R. Co. v. Brotherhood of Ry. & S. S. Clerks, 281 U. S. 548;
Marbury v. Madison, 1 Cranch. 137, 2 L. Ed. 60;
Wolf v. Smith, 149 Ala. 457, 42 So. 824.

If the violation of a crude village ordinance resulting in injury is actionable, it would appear that these stockholders and the public service agency, in which they have associated their savings and have devoted them to the public service under the laws of Alabama inviting that action, can complain of the annihilation of that investment by a systematic violation of the Tenth Amendment and by a systematic series of acts that constitute illegal competition, including not merely the illegal use of federal funds but administrative abuse of asserted federal powers.

This court stated in *Monongahela Bridge Co. v. U. S.*, 216 U. S. 177, 195:

> "Courts have rarely, if ever, felt themselves so restrained by technical rules that they could not find some remedy, consistent with the law, for acts, whether done by government or by individual persons, that violated justice or were hostile to the principles devised for the protection of the essential rights of property."

As to the right to enjoin illegal competition threatening the Power Company's series of basic franchises (Findings 22, 24, II-1040), excerpted in the margin,[*] there can be no doubt, even as to those areas in which the Company is serving, although definite-term franchises have expired.

Denver v. Denver Union Water Co., 246 U. S. 178;

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[*] (1) Under the laws of Alabama for construction of water powers. Code Sec. 3627-37, Code of 1907 (Sections 7193-7203, also 10570, Code of 1923).

(2) Under Act of Congress: March 4, 1907, 34 Stat. 288; Lock 12 (Lay) Dam.

(3) Under licenses from Federal Power Commission. Federal Water Power Act (41 Stat. 1063; 16 U. S. Code 791-823) (Mitchell Dam, License No. 82; Jordan Dam, License No. 618).

(4) Certificates of Public Convenience and Necessity Under the Alabama Public Utility Act of 1920, Section 9795, Code of 1923.

(5) Under State law authorizing lines over public highways, Section 7197, Code of 1923.

Frost v. Corporation Commission, 278 U. S. 515;
Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229;
Washington Water Power Co. v. City of Coeur d'Alene, 9 F. Supp. 263;
Gallardo v. Porto Rico Ry. & Light & Power Co. (C. C. A. 1st, 1927), 18 F. (2d) 918;
Duke Power Co. v. Greenwood County, 10 Fed. Supp. 854;
City of Campbell v. Arkansas-Missouri Power Co. (C. C. A. 8th, 1932), 55 F. (2d) 560;
Denver Tramway Corp. v. Peoples Cab Co. of Denver, Inc. (Dist. Ct. Colorado, 1932), 1 F. Supp. 449;
Colorado Cent. Power Co. v. Municipal Power Development Co. (Dist. Ct. Colorado, 1932), 1 F. Supp. 951;
Missouri Public Serv. Co. v. City of Concordia, Mo. (Dist. Ct. Mo., 1934), 8 F. Supp. 1;
Pomeroy's Equity Jurisprudence, Vol. 5, Sec. 2017 (4th Ed.);
Corporation Commission of Oklahoma v. Lowe, 281 U. S. 431 (1930);
New State Ice Co. v. Liebman, 285 U. S. 261;
Pierce v. Society of Sisters, 268 U. S. 510.

As to irreparable damage threatened to the Power Company, the record is incontestable. It is immediately confronted with the loss of its property, business and franchises in North Alabama by the TVA program (Fngs. 24, II-1041; 77, II-1062). The answers of the defendant municipalities in uniform terms not only admit but assert affirmatively that the alternative before the Company was sale under the option of August 9, 1934, or wreckage (I-247, 352, 257). See also Section 20 of the answer of Alabama Power Company, I-305.

"We are sure," asserts TVA, "the Power Company would prefer to accept our money for a definite sale rather than risk the chance of these facilities being duplicated by the communities themselves" (II-564). This was admitted by Chairman Morgan (II-433). We discuss at another point in the brief other actionable means employed by TVA in pressing its program.

The representation by TVA made by its 20-year contracts with its municipal agencies in taking the business from the Power Company, is a representation that the government of the United States is committing itself by the contract to continuous utility servitude, from which it can not withdraw, impairing its ability to dispose of federal property or to legislate a change in policy, is not only a systematic organic misrepresentation constituting an unfair method of competition, but is, in the execution of the contract itself, an illegal act and means.

As to ordinary misrepresentations constituting illegal means of competition, see

> *Federal Trade Comm. v. Royal Milling Co.*, 288 U. S. 212;
> *Federal Trade Comm. v. Algoma Lbr. Co.*, 291 U. S. 67;
> *Federal Trade Comm. v. Winsted Hosiery Co.*, 258 U. S. 483.

What could be more gravely reprehensible as a means of competition than a systematic enticement of customers by covenants offered by TVA abdicating the legislative power of Congress and the sovereignty of the United States?

In the recent gold cases, *Norman v. Balto. & O. R. Co. supra*, this Court, speaking through the Chief Justice, asserted:

> "Contracts, however express, cannot fetter the constitutional authority of the Congress. Contracts may create rights of property, but, when contracts deal with a subject-matter which lies within the control of the Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them. * * * This principle has familiar illustration in the exercise of the power to regulate commerce" (55 Sup. Ct. at 416).

The fact that these contracts are being offered to others and that petitioners' corporation would not be damaged when performance failed, is not the point. The point is that TVA is obtaining business by representing that it is giving a firm and enforceable agreement when it is not binding on the government.

CONCLUSION.

This cause is revolutionary in its importance. It presents the effort of the government through a board of three men, subject to none of the traditional checks, standards or restraints, to establish the government permanently in absolute control of the power of a vast region.

The program involves the assumption by the government of a business which is intrinsically local in character, the regulation of which has been a matter of local jurisdiction from the beginning of the industry, the transfer of which to the Federal government shatters the theory of the Tenth Amendment.

The corporation was created with powers deliberately intended to free it from restraints.

It may, at will, initiate federal utility service at any point within the area indicated, or withhold it, without requiring approval of any public authority. This result obliterates the uniform requirements of the states to protect public service from duplication.

It may single out existing utilities for competitive destruction, with no recourse or appeal. It does not have to condemn properties. It takes them at its own price under threat of competition.

Or it may, careless of the destruction of existing investment, proceed with duplication.

The theory upon which the program is sought to be justified will, if sustained, place within reach of the discretion of a majority in congress the ability to place the government of the United States in every form of collective enterprise, for the production and sale of commodities which might be asserted by congress to require stand-by preparedness for war or for service of supply or other federal function however remote. Having a lien upon a large part of the agricultural acreage, or having acquired vast segments of the staple crops of the nation, it may, on the theory of the Tennessee Valley Authority, warehouse them or process them through to finished products and by-products to be marketed throughout state domain in competition with citizens.

Those results would be directly and necessarily authorized as functions of the federal government if the position of the Tennessee Valley Authority be sustained.

Under a single contract directly involved on this record, the government proposes to take over the permanent domestic, commercial and industrial service of 10,000 customers.

As shown by this record, the proposal necessarily and directly involves a monopoly in fact, through competitive exhaustion of the existing utilities and their inability to compete with a government free from taxation, free from adverse consequences of operating deficits and with unlimited funds to carry out its program and liquidate its mistakes.

Also underlying the certainty of practical monopoly, there is the practice, beginning with the establishment of the Post Office (Act of Feb. 20, 1792, 1 Stat. 232, U. S. C., Title 18, Sec. 304, *et seq.; United States v. Southern Pacific* [D. C. Ariz. 1928], 29 Fed. [2d] 433), under which as a supposed incident to the right of the government to engage in business, the right is asserted to exclude citizens from competing (*Williams v. Wells Fargo & Co. Express,* 177 Fed. 352).

We do not mean to intimate that such monopolistic action even as to post offices has been validly enacted. *Ex Parte Jackson,* 96 U. S. 727.

So long as the three men conducting the TVA have access to a hundred million dollars of United States bonds as provided by Section 15, and Section 15 (a) added by amendment, it will not be necessary for TVA to request the adoption by congress of a bill of attainder against the local utilities. TVA will attend to that matter by its own methods.

So far as the federal government is concerned, there is no distinction whatever, functional or constitutional, between the proprietary function of generating and distributing electric energy by means of federal facilities and the proprietary function of manufacture and sale of any other commodity capable of being produced by the utilization of federal property. The first step beyond the inert plant itself, whether steam or hydro, or beyond the raw-material, whether in the energy in the water of the stream which TVA proposes to pervert to its own uses in the name of the commerce power, or in coal or other fuel, is a function of manufacturing, lawful or unlawful according as it may or may not be employed for governmental use.

It is not overstating the matter to say that a decision sustaining the contention of the TVA as to the power of congress asserted on this record would change the form of the federal government and the social organization of the American people. The permanent conduct of a series of co-operative enterprises covering the basic requirements and activities of the people by means of federal property, inextinguishably subsidized by taxation and supported by federal borrowing and deficits, would, at one stroke, accomplish an economic revolution and annul the theory of the constitution. So far as internal affairs are concerned that asserted grant of implied power, which remained invisible, inarticulate and unknown for a century and a half, would make all others superfluous.

Respectfully submitted,

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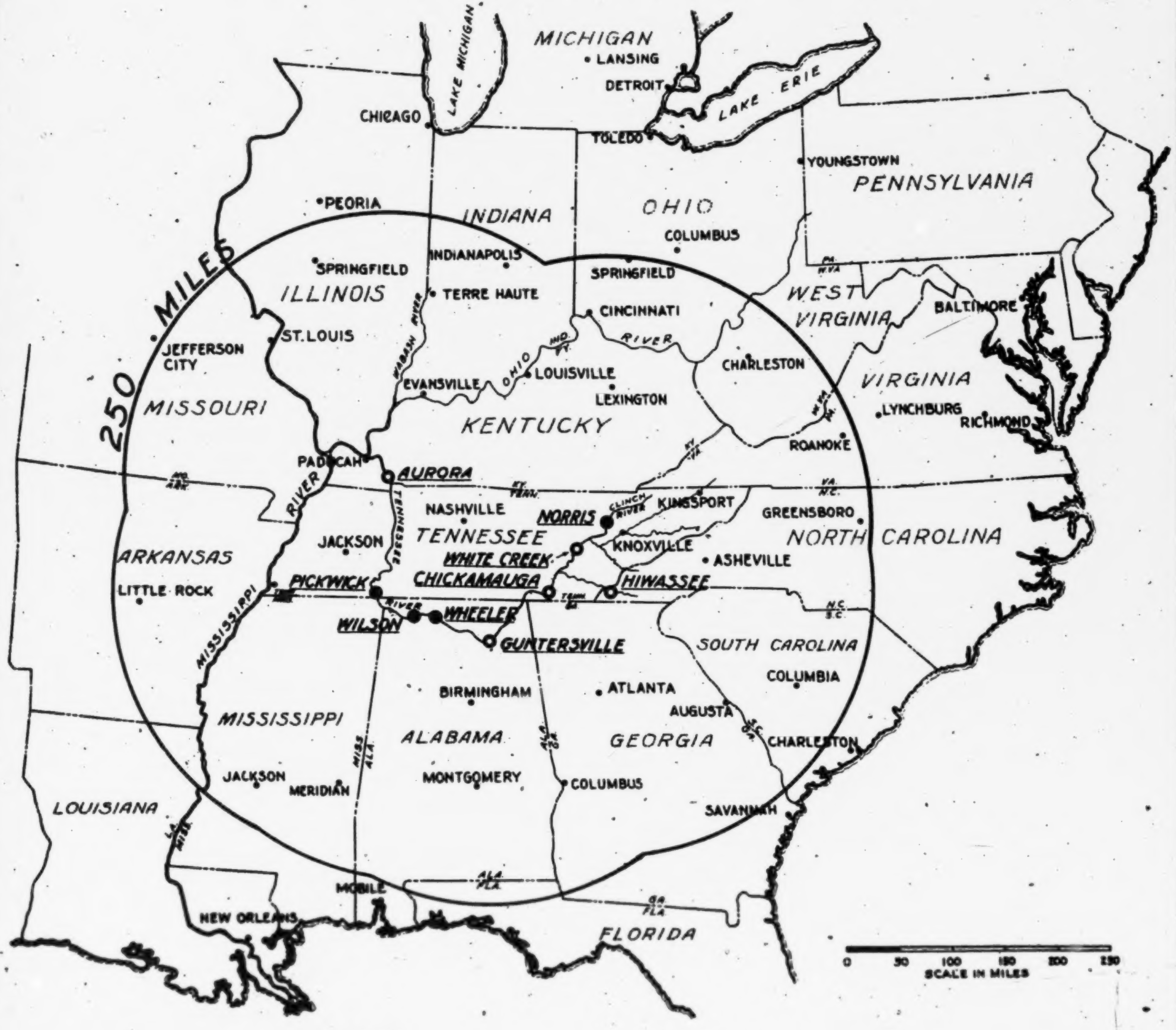
FORNEY JOHNSTON,
Attorneys for Petitioners.

JOS. F. JOHNSTON,
Of Counsel.


250 MILES
MICHIGAN
LANSING
DETROIT
LAKE MICHIGAN
LAKE ERIE
CHICAGO
TOLEDO
YOUNGSTOWN
PENNSYLVANIA
PEORIA
INDIANA
OHIO
COLUMBUS
INDIANAPOLIS
SPRINGFIELD
ILLINOIS
TERRE HAUTE
SPRINGFIELD
CINCINNATI
WEST VIRGINIA
BALTIMORE
ST. LOUIS
JEFFERSON CITY
MISSOURI
WABASH RIVER
EVANSVILLE
OHIO RIVER
LOUISVILLE
LEXINGTON
CHARLESTON
VIRGINIA
LYNCHBURG
RICHMOND
KENTUCKY
ROANOKE
PADUCAH
AURORA
NASHVILLE
NORRIS
CLINCH RIVER
KINGSPORT
GREENSBORO
TENNESSEE
KNOXVILLE
NORTH CAROLINA
JACKSON
WHITE CREEK
ASHEVILLE
ARKANSAS
LITTLE ROCK
PICKWICK
CHICKAMAUGA
HIWASSEE
TENNESSEE RIVER
MISSISSIPPI RIVER
WILSON
WHEELER
GUNTERSVILLE
SOUTH CAROLINA
COLUMBIA
BIRMINGHAM
ATLANTA
AUGUSTA
MISSISSIPPI
ALABAMA
GEORGIA
CHARLESTON
JACKSON
MERIDIAN
MONTGOMERY
COLUMBUS
LOUISIANA
SAVANNAH
MOBILE
NEW ORLEANS
FLORIDA
0 50 100 150 200 250
SCALE IN MILES

LEGEND

TVA Power Dams Existing or Under Construction. - ●
TVA Power Dams Announced or Projected. - ○

Potential Prime Power on Tennessee River and Tributaries
U.S. Engineers (House Doc. 328 p. 92 3,500,000 to 4,000,000 firm Horse-power or 25,000,000,000 Kilowatt Hours per Annum.

Total Market Demand in Tennessee River Basin for Year 1950 as Estimated by U.S. Engineers (ib. p. 88) - 5,900,000,000 Kilowatt Hours per Annum.

Total Area within Circles 375,680 Sq. Mi.
Approximate Population of Area - 24,400,000
Approximate Estimate of Electric Utility Investment within Area as Derived from Moody's Manual of Public Utilities, 1935 and U.S. Census of Electrical Industries, 1932 - $1,500,000,000

SCOPE OF ANNOUNCED TENNESSEE VALLEY AUTHORITY ELECTRIC PROGRAM

The TVA Act contemplates distribution within transmission distance of the existing and proposed power houses, taken at 250 miles under existing practice.

The announcement of August 25, 1933 (I-108) contemplated extensions beyond the initial area should "the public interest require" (I-110). The official TVA release of October 22, 1934, describes as within the area of power distribution, Little Rock, St. Louis, Terre Haute, Asheville, Cincinnati - "Wherever power can be transmitted from generating plants along the Tennessee River or its tributaries". This radius includes practically the entire service area of the Alabama Power Company.

EXCERPT FROM TVA MINUTES, OCT. 13, 1933 (II-541-542)

"(a) That two major holding companies, the Commonwealth and Southern Corporation and the Electric Bond and Share Company, own a network of transmission lines and distribution systems, together with generating facilities within the area of operations of the Tennessee Valley Authority. In the scale of rates charged by these companies, these facilities are more than ample to meet existing effective demand for electric service and represent an investment of many millions of dollars. A substantial, and perhaps the major part of the securities issued to finance these facilities are in the hands of the public.

"(b) The Tennessee Valley Authority has available about 105,000 KW of firm power at Muscle Shoals and with the completion of Norris Dam this will be more than doubled. The existing demand is being adequately supplied by the privately owned utilities."

SCOPE OF TVA PROGRAM

(OFFICIAL RELEASES IN EVIDENCE)

"The TVA policy contemplates full corporate discretion by TVA in developing, executing and extending its electric system within transmission limits." Finding 67, II-1059.

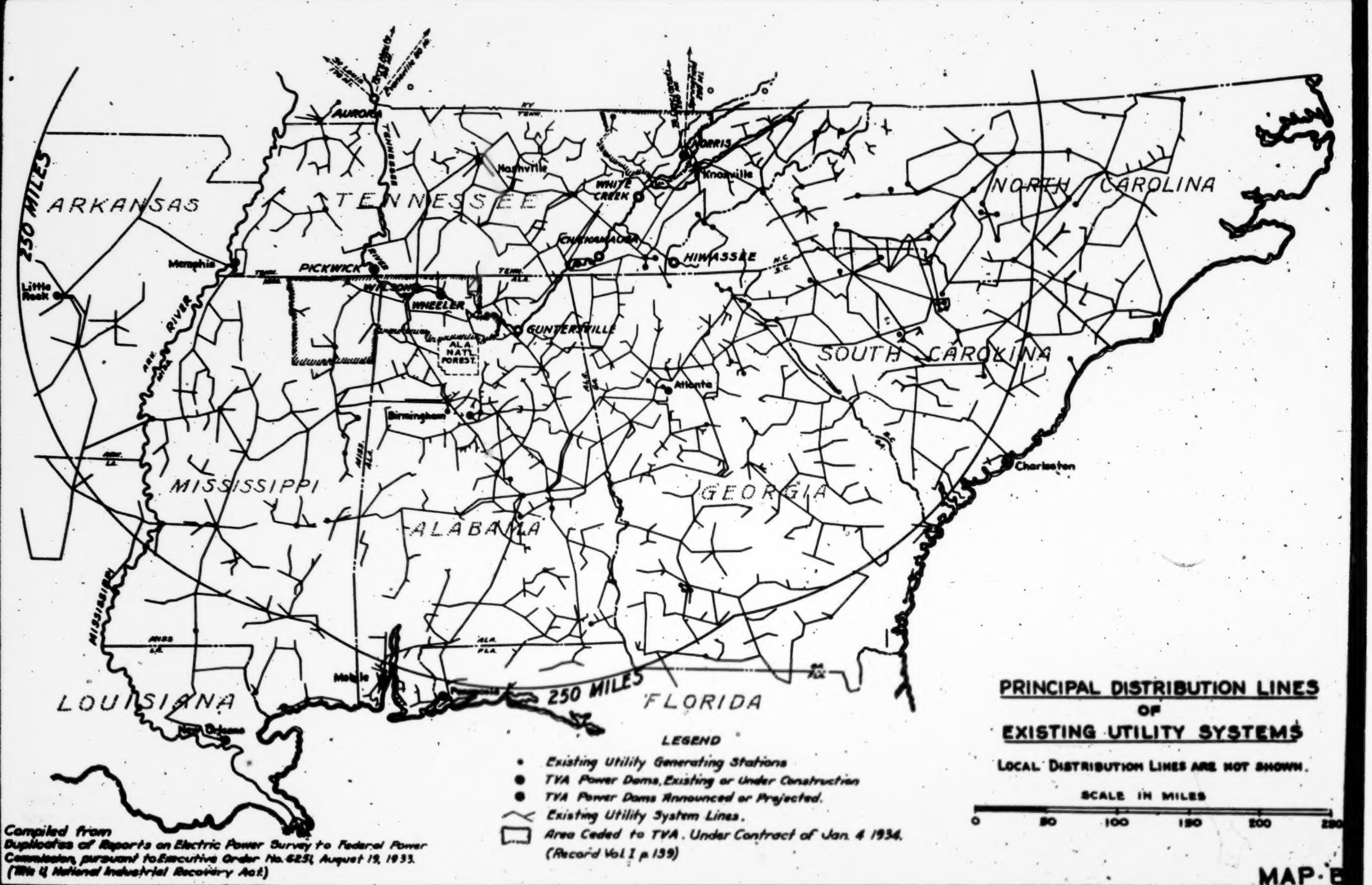
"The Authority is concerned with the power development of the valley region as a whole. It is authorized to construct such dams in the area as it deems necessary, and to generate and distribute power from them." (I-112)

"No more ambitious program of hydro-electric development has ever been actually undertaken in this country,-- We are making provision for one of the largest hydro-electric developments in the world." (I-114, II 633, 634).

"When we carry this program into every town and city and village, and every farm throughout the country, we will have written the greatest chapter in the economic, industrial and social development of America." (I-113).

"The power policy written into the Tennessee Valley Authority Act represents an attempt to regulate public utilities not by quasi-judicial commissions, but by competition. The Act definitely puts the Federal government into the business of rendering electric service. The Authority is required to acquire a market, to set up an area in which to conduct its operations. The results of these operations in this limited area are intended to serve as a 'yardstick' by which to measure the fairness of the rates of private utilities, and to prevent destructive financial practices by private utilities.

"..... In carrying out this competitive relation between the Federal government and the private business of electricity, the wastes of competition are to be eliminated, and the regulatory function of competition emphasized." (II 634)


ARKANSAS
TENNESSEE
NORTH CAROLINA
SOUTH CAROLINA
GEORGIA
ALABAMA
MISSISSIPPI
LOUISIANA
FLORIDA
250 MILES
250 MILES
AURORA
Nashville
WHITE CREEK
NORRIS
Knoxville
CHICKAMAUGA
HIWASSEE
PICKWICK
WILSON
WHEELER
GUNTERSVILLE
ALA. NAT'L FOREST
Memphis
Little Rock
Birmingham
Atlanta
Charleston
Mobile
New Orleans
ARK. RIVER
RIVER
TENNESSEE RIVER
MISSISSIPPI
LEGEND
Existing Utility Generating Stations
TVA Power Dams, Existing or Under Construction
TVA Power Dams Announced or Projected.
Existing Utility System Lines.
Area Ceded to TVA. Under Contract of Jan. 4 1934. (Record Vol. I p. 139)
SCALE IN MILES
0
50
100
150
200
250

PRINCIPAL DISTRIBUTION LINES OF EXISTING UTILITY SYSTEMS

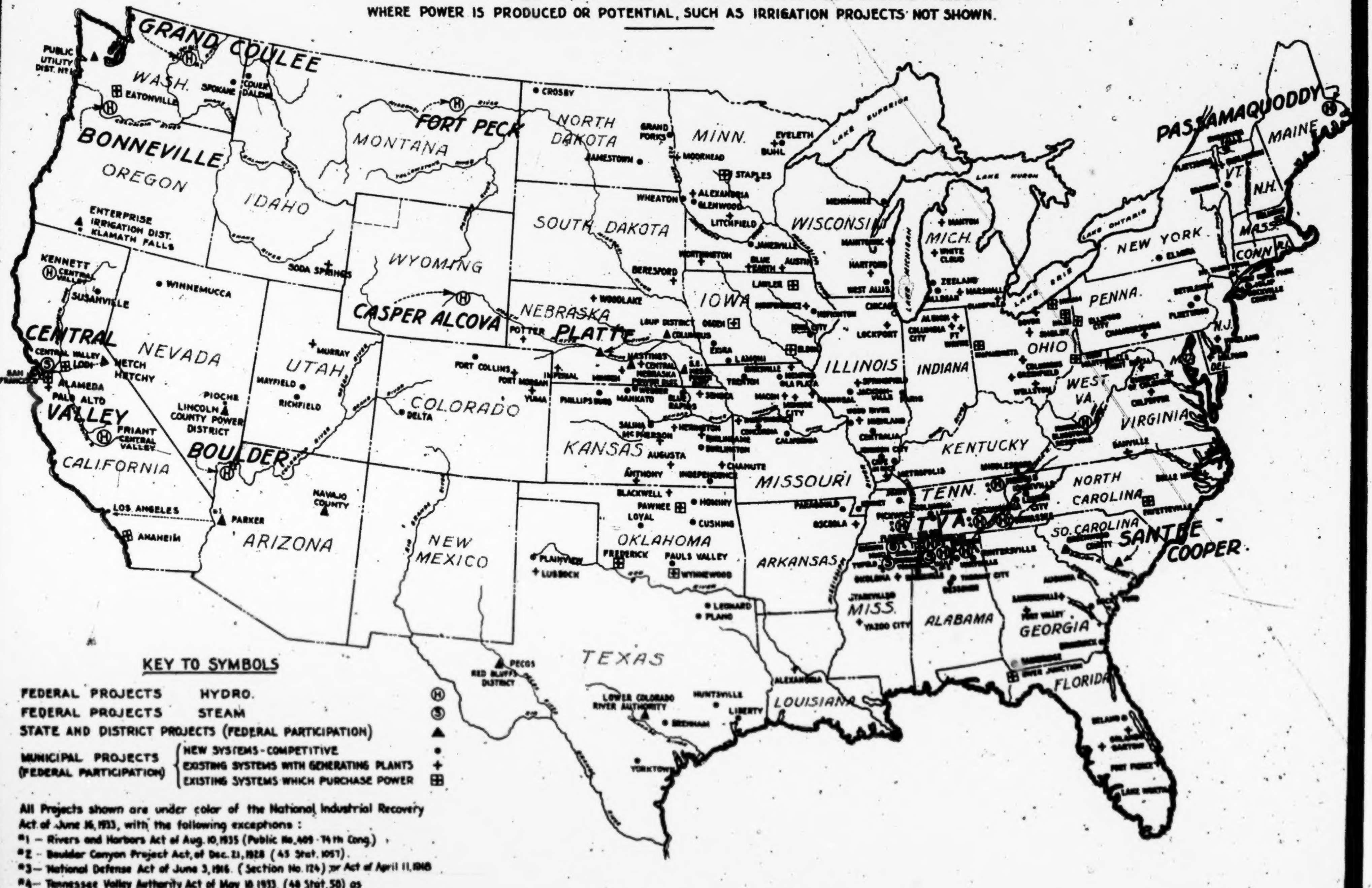
LOCAL DISTRIBUTION LINES ARE NOT SHOWN.

Compiled from
Duplicates of Reports on Electric Power Survey to Federal Power Commission, pursuant to Executive Order No. 6251, August 19, 1933.
(Title II National Industrial Recovery Act.)

MAP·B

ELECTRIC POWER PROJECTS
CONSTRUCTED OR FINANCED BY THE FEDERAL GOVERNMENT
ON WHICH WORK HAS BEGUN OR ALLOTMENTS ANNOUNCED
NOVEMBER 1935

POWER DEVELOPMENT AND DISTRIBUTION ARE NOT THE EXCLUSIVE PURPOSES OF SOME OF THESE PROJECTS; NOR DOES THIS MAP INCLUDE ALL FEDERAL PROJECTS WHERE POWER IS PRODUCED OR POTENTIAL, SUCH AS IRRIGATION PROJECTS NOT SHOWN.


GRAND COULEE
PUBLIC UTILITY DIST. NO 1
WASH.
SPOKANE
COEUR D'ALENE
EATONVILLE
BONNEVILLE
OREGON
IDAHO
MONTANA
FORT PECK
CROSBY
NORTH DAKOTA
GRAND FORKS
JAMESTOWN
MINN.
EVELETH
BUHL
MOORHEAD
STAPLES
WHEATON
ALEXANDRIA
GLENWOOD
LITCHFIELD
SOUTH DAKOTA
BERESFORD
WORTHINGTON
BLUE EARTH
AUSTIN
JANESVILLE
LAKE SUPERIOR
LAKE HURON
LAKE MICHIGAN
LAKE ERIE
LAKE ONTARIO
WISCONSIN
MENOMINEE
MANITOWOC
HARTFORD
WEST ALLIS
MICH.
MANTON
WHITE CLOUD
ZEELAND
MARSHALL
ENTERPRISE IRRIGATION DIST.
KLAMATH FALLS
SODA SPRINGS
WYOMING
CASPER ALCOVA
KENNETT CENTRAL VALLEY
SUSANVILLE
WINNEMUCCA
CENTRAL VALLEY
NEVADA
CENTRAL VALLEY
LODI
HETCH HETCHY
SAN FRANCISCO
ALAMEDA
PALO ALTO
UTAH
MURRAY
MAYFIELD
RICHFIELD
PIOCHE
LINCOLN COUNTY POWER DISTRICT
FRIANT CENTRAL VALLEY
CALIFORNIA
BOULDER
LOS ANGELES
ANAHEIM
PARKER
ARIZONA
NAVAJO COUNTY
NEW MEXICO
COLORADO
FORT COLLINS
FORT MORGAN
YUMA
DELTA
NEBRASKA
PLATTE
WOODLAKE
POTTER
LOUP DISTRICT
COLUMBUS
HASTINGS
CENTRAL NEBRASKA
IMPERIAL
IOWA
OGDEN
LAWLER
KANSAS
PHILLIPSBURG
MANKATO
SENECA
SALINA
McPHERSON
HERINGTON
BURLINGTON
AUGUSTA
ANTHONY
INDEPENDENCE
CHANUTE
MISSOURI
TRENTON
MACON
COLUMBIA
CALIFORNIA
ILLINOIS
LOCKPORT
CHICAGO
SPRINGFIELD
JACKSONVILLE
WOOD RIVER
HIGHLAND
CENTRALIA
METROPOLIS
INDIANA
COLUMBIA CITY
FT WAYNE
OHIO
COLUMBUS
GREENFIELD
WELLSTON
PENNA.
NEW YORK
ELMIRA
N.J.
DEL.
WEST VA.
VIRGINIA
DANVILLE
KENTUCKY
TENN.
TVA
MIDDLESBORO
NORTH CAROLINA
FAYETTEVILLE
SO. CAROLINA
SANTEE COOPER
GEORGIA
FORT VALLEY
FLORIDA
RIVER JUNCTION
DELAND
FORT PIERCE
LAKE WORTH
ALABAMA
HUNTSVILLE
MISS.
TUPELO
STARKVILLE
YAZOO CITY
ARKANSAS
PARAGOULD
OSCEOLA
LOUISIANA
ALEXANDRIA
OKLAHOMA
BLACKWELL
PAWNEE
HOMINY
LOYAL
CUSHING
FREDERICK
PAULS VALLEY
WYNNEWOOD
PLAINVIEW
LUBBOCK
TEXAS
LEONARD
PLANO
PECOS
RED BLUFF DISTRICT
LOWER COLORADO RIVER AUTHORITY
HUNTSVILLE
LIBERTY
BRENHAM
YORKTOWN
PASSAMAQUODDY
MAINE
VT.
N.H.
MASS.
CONN.
R.I.

KEY TO SYMBOLS

FEDERAL PROJECTS	HYDRO.	Ⓗ
FEDERAL PROJECTS	STEAM	Ⓢ
STATE AND DISTRICT PROJECTS (FEDERAL PARTICIPATION)		▲
MUNICIPAL PROJECTS (FEDERAL PARTICIPATION)	NEW SYSTEMS - COMPETITIVE	●
	EXISTING SYSTEMS WITH GENERATING PLANTS	✚
	EXISTING SYSTEMS WHICH PURCHASE POWER	⊞

All Projects shown are under color of the National Industrial Recovery Act of June 16, 1933, with the following exceptions :

*1 – Rivers and Harbors Act of Aug. 10, 1935 (Public No. 409 - 74th Cong.)

*2 – Boulder Canyon Project Act, of Dec. 21, 1928 (45 Stat. 1057).

*3 – National Defense Act of June 3, 1916. (Section No. 124) or Act of April 11, 1918

*4 – Tennessee Valley Authority Act of May 18, 1933, (48 Stat. 58) as amended by Public No. 412, 74th Cong., approved August 31, 1935.